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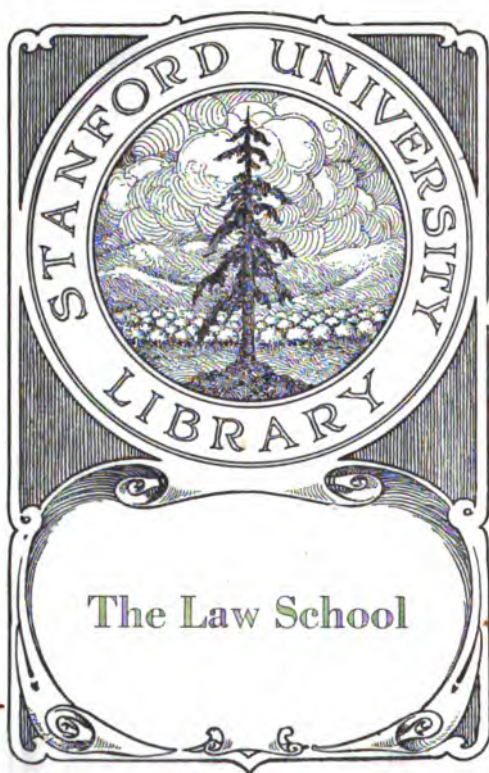
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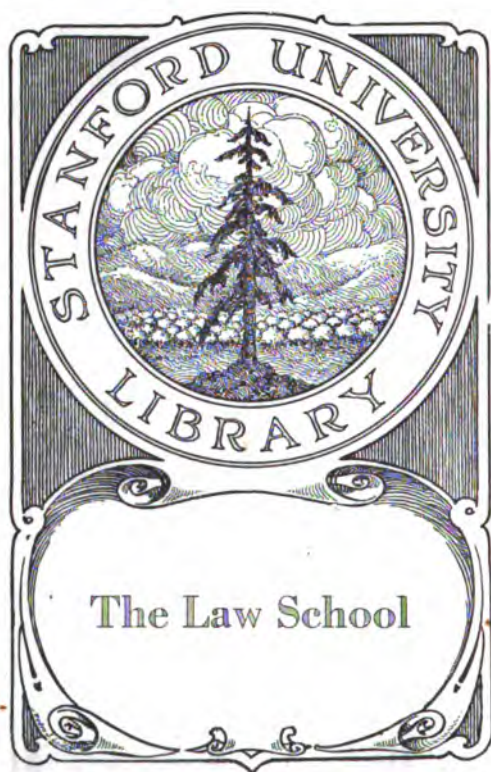
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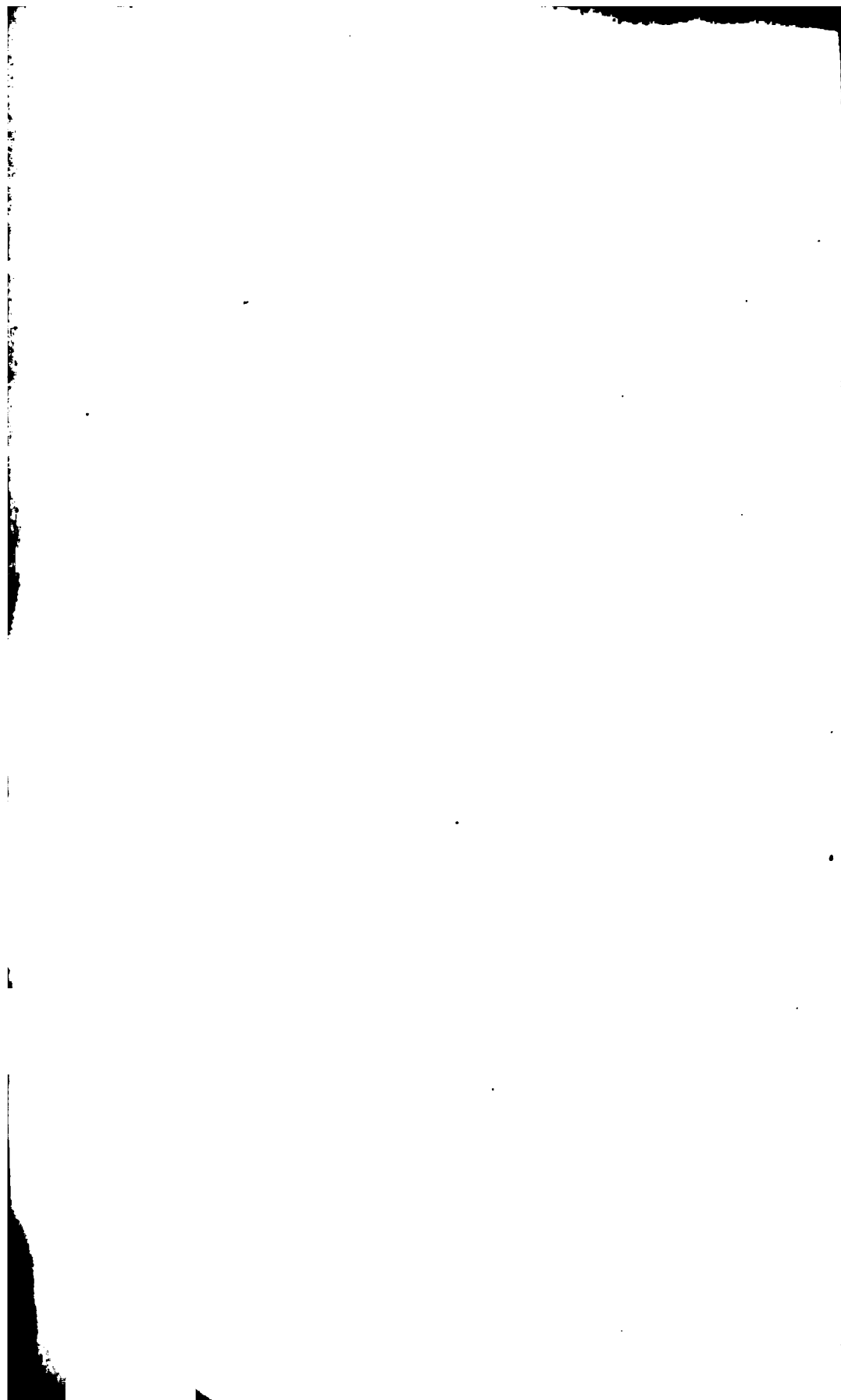


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THE PRACTICE  
IN  
CIVIL ACTIONS AND PROCEEDINGS

IN THE  
SUPREME COURT OF PENNSYLVANIA,  
IN THE  
DISTRICT COURT AND COURT OF COMMON PLEAS  
FOR THE  
*City and County of Philadelphia,*  
AND IN THE  
COURTS OF THE UNITED STATES.

BY FRANCIS J. TROUBAT AND WILLIAM W. HALY

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## CHAPTER XIX.

### OF MOTIONS FOR NEW TRIALS, AND TO TAKE OFF NONSUITS, AND ARREST OF JUDGMENT.

Party who has verdict entitled to judgment after four days.

During this period unsuccessful party may move for new trial or arrest of judgment.

#### SECTION I. OF MOTIONS FOR NEW TRIALS, AND TO TAKE OFF NONSUIT. P. 590.

When motion for new trial to be made. Granting this motion matter of discretion for the court.

Decision of jury on issue in fact generally conclusive.

Two classes of cases to be considered on motions for new trials, viz.: where nonsuit is entered and where party has been surprised by unexpected evidence.

Practice in relation to new trials, note.

Motion for new trial not a waiver of bill of exceptions.

Grounds of motion for new trial.

Misdirection of court.

Error in admission or rejection of evidence.

Verdict against law.

Verdict against evidence.

Irregularity of jurors.

Misconduct by prevailing party.

After-discovered evidence.

(1). The evidence must have been discovered since the former trial.

(2). It must be such as could not have been secured on the former trial by reasonable diligence on the part of the losing party.

(3). It must be material in its ob-

ject, and not merely cumulative and corroborative or collateral.

(4). It must be such as ought to produce on another trial an opposite result on the merits.

Absence.

Want of notice.

Mistake.

Surprise.

Irregularity in impanelling jury.

Unsuitable damages.

Time and form of notice.

Terms and costs.

#### SECTION II. OF ARREST OF JUDGMENT. P. 619.

After judgment arrested, a new action must be brought within one year.

Costs must also be paid.

Reasons for arrest of judgment.

Causes of arrest must appear on the record.

Whatever may be alleged in arrest of judgment must be such matter as would be fatal upon demurrer, but every good cause of demurrer may not be good cause for arrest of judgment.

Certain defects cured by verdict.

After judgment on demurrer, judgment cannot be arrested.

If judgment be erroneously arrested, Supreme Court will correct on error.

Judgment may be arrested for objection on face of record, though such objection be not made at time of filing motion.

Judgment will be arrested where court has no jurisdiction.

THE party who has obtained a verdict is entitled to judgment, but before he can avail himself of it, a period of four days must, by the practice of the courts, elapse. And, during this period, certain proceedings may be taken by the unsuccessful party to avoid the effect of the verdict, the principal of which is, in our practice, a motion for a new trial, or in arrest of judgment.

## SECTION I.

## OF MOTIONS FOR NEW TRIALS, AND TO TAKE OFF NONSUIT.

"It may happen that one of the parties may be dissatisfied with the opinion of the judge expressed on the trial, whether relating to the effect or the admissibility of evidence; or may think the evidence against him insufficient in law, where no adverse opinion has been expressed by the judge, and yet may not have obtained a special verdict, or demurred to the evidence, or tendered a bill of exceptions.<sup>1</sup> He is at liberty, therefore, after the trial, and during the period above mentioned, to move the court in banc to grant a new trial, on the ground of the judge's having misdirected the jury, or having admitted or refused evidence contrary to law; or, where there was no adverse direction of the judge, on the ground that the jury gave their verdict contrary to the evidence, or on evidence insufficient in law.<sup>2</sup> And resort may be had to the same remedy, in other cases, where justice appears not to have been done at the first trial; as, where the verdict, though not wholly contrary to evidence, or on insufficient evidence in point of law, is manifestly wrong in point of discretion, as contrary to the weight of the evidence, and on that ground disapproved by the judge at the trial.<sup>4</sup> So a new trial may be moved for where a new and material fact has come to light since the trial, which the party did not know, and had not the means of proving before the jury; or where the damages given by the verdict are excessive, or where the jury have misconducted themselves, as by casting lots to determine their verdict, &c. In these and the like instances, the court will, on motion, and in the exercise of their discretion, under all the circumstances of the case, grant a new trial, that opportunity may be given for a more satisfactory decision of the issue.<sup>5</sup> A new jury process consequently issues, and the cause comes on to be tried *de novo*. But, except on such grounds as these, tending manifestly to show that the discretion of the jury has not been legally or properly exercised, a new trial can never be obtained; for it is a great principle of law, that the decision of a jury, upon an issue in fact, is in general irreversible and conclusive."<sup>6</sup>

<sup>1</sup> For an interesting view of the origin and reason of new trials, see 3 Bl. Com. 386, 393; Brac. Law Mis. 549, 560.

<sup>2</sup> A motion for a new trial, however, may be made after a bill of exceptions taken: *Shaeffer v. Landis*, 1 S. & R. 449.

<sup>3</sup> See *Rose v. Turnpike Co.*, 3 Watts 48.

<sup>4</sup> *Bartholomew v. Judykunst*, 3 Pa. R. 493.

<sup>5</sup> *Kelsey v. Murphy*, 6 Casey 340.

<sup>6</sup> *McIntire v. Stringer*, 3 Phila. Rep. 302; *Steph. on Plead.* 115, 117. The following opinion is given at length, as

embodying in a clear and compact form certain valuable principles:—

*Bartolett v. Faust*, 20 Phila. Leg. Int. 93, March 20th 1863, C. P. Schuylkill county, per PARRY, P. J. "In what cases a new trial has been held to be almost a matter of course. The practice in England in relation to new trials is stated in Seldon's Practice, vol. 1, p. 85, published in 1798, as follows: "On motion for a new trial, the usual way is to grant a rule to show cause; and then the *puisne* judge of the court speaks to the judge who tried the case (of another court), and obtains a report from him of the trial, and also a



In considering the general question, there are two classes of cases to be considered, in which there is an inflection of the rules by which, as will presently be seen, the discretion of the court is governed.

signification of his sentiments on it; if the judge declares himself satisfied with the verdict, it hath been usual not to grant a new trial on account of its being a verdict against evidence; on the other hand, if he declares himself dissatisfied with the verdict, it is pretty much of course to grant it."

In Tidd's Practice, vol. 2, p. 821, published in 1803, the rule is stated in nearly the same words, and also in Buller's N. P. 326.

In Chitty on General Practice, published in 1838, vol. 4, p. 87, this rule is thus stated: "In all the courts, if the judge who tried the cause declares himself satisfied with the verdict, it hath been usual to refuse to grant a new trial on account of its being against evidence; whilst on the other hand, if he declares himself dissatisfied with the verdict, it is (then almost) of course to grant it."

In Bacon's Abr. vol. 7, p. 766, tit. "Trial," it is said: "It is in general true, that the court will not grant a new trial unless a report be made of the trial by the judge before whom the cause was tried. But if the judge before whom the cause was tried die before he make a report of the trial, the court will receive an account thereof by affidavit. The report of the judge before whom the cause was tried, is conclusive upon a motion for a new trial, as to everything which passed at the trial."

These authorities are cited to show, that in England, from whence we derive our common law and rules of practice, the deference that is shown by the judges who decide upon the applications for new trials to the opinion of the judge who tried the cause, and who, of all others, is best qualified to determine whether the verdict of the jury was contrary to his directions or against the evidence.

The same rule was adopted in this State by the Supreme Court, when the judges of that court held Circuit Courts for the trial of causes in different counties of the State.

In *Ross et al. v. Eason*, 1 Yeates 14, the cause was tried before the chief justice, who reported the evidence to be strongly in favor of the plaintiff, and the verdict was in favor of the de-

fendant, against the direction of the charge, the court granted a new trial; and said in delivering their opinion, that in two other cases they had ordered new trials where the verdict had been for the defendant against evidence.

In *Emmet v. Robinson et al.*, 2 Yeates 514, the chief justice reported the evidence of the trial before him, and it appearing that the verdict was against the evidence and charge of the court, a new trial was granted.

In *Vanleer v. Vanleer*, 4 Yeates 3, a new trial on a feigned issue respecting the validity of a will, was awarded on the dissatisfaction of one of the judges who tried it.

In *Swearingen v. Birch*, 4 Yeates 322, the judges of the Circuit Court thought that the weight of evidence preponderated in favor of the defendant; the jury found for the plaintiff, and the court granted a new trial. The plaintiff appealed to the court in banc. The court affirmed the order of the Circuit Court. In delivering the opinion of the Supreme Court, TILGHMAN, C. J., said: "Questions of law are to be decided by the court, and questions of fact by the jury, and in granting new trials the court are bound to exercise a reasonable and legal discretion. But it by no means follows from these principles, that if the jury find a verdict, which in the opinion of the court is against the evidence, a new trial ought not to be granted; because by granting a new trial, the court do not assume to themselves the trial of facts; they only submit the facts to the consideration of another jury. A case was cited from 3 Wils. 47, to show that where evidence is given on both sides, a new trial is not to be granted; but this is not a sound principle. There may be contrariety of evidence, yet the weight of it greatly preponderates against the verdict; and in such cases, justice requires that there should be a second trial. And such are the authorities. It is extremely difficult for this court, who did not hear the evidence, to ascertain with precision what was the weight on the other side. The notes of the judge who tried the cause cannot give so clear an idea of it as if we heard the testimony. For this reason we are bound to pay very great

The first class comprises those cases where a nonsuit is entered, and where the only injury to the plaintiff from continuing it will be the loss of costs, in which case the court will adhere with the greater

respect to the opinion of those judges, especially as they have ordered a new trial, which insures to the plaintiff the opportunity of attaining the justice of his case."

In *Pringle et al. v. Gaw*, 6 S. & R. 298, the verdict was for the defendant, and the plaintiff moved for a new trial. Judge Gibson, before whom the cause was tried at Nisi Prius, having declared that in his opinion the verdict was greatly against the evidence, and the justice of the case, the Supreme Court ordered a new trial.

In *Willing et al. v. Brown*, 6 S. & R. 457, the jury having presumed the evidence of record on very slight grounds, and contrary to the opinion of the judge who tried the cause, the court set aside their verdict.

In *Flemming v. The Marine Insurance Co.*; 4 Whart. 59, it was held that though a judge may be wrong in his charge to the jury, even in stating that there was no evidence on a particular point, when in fact there was some evidence, yet if the jury find against the charge, a new trial will be granted. In delivering the opinion of the court in this case, Justice KENNEDY said: "In order that the jurors and others may know that the directions and decisions of the court on any question of law arising in the cause, an issue of fact is not to be disregarded; and that a verdict given against such direction, whatever it may be, can never avail anything unless it be to occasion additional delay, trouble, and expense to the parties, as also to the public, the course of the court is to set aside the verdict and order a new trial. And a court from whose decisions on questions of law an appeal lies by writ of error or otherwise, ought never to depart from this course, otherwise the party against whom the verdict is given loses the benefit of such appeal, and of hearing the question decided by the appellate court; which would be a most unjust and illegal deprivation of his right."

In a late case in the Court of Common Pleas, in England, *Wood v. Cox*, 84 E. C. L. R. 280, on a rule for a new trial on the ground that the verdict was perverse, Lord Chief Justice JERVIS said: "Without discussing the merits of the case or the propriety of

the direction of the presiding judge, I think the verdict cannot possibly be sustained. The judge directs the jury to find for the plaintiff, telling them there is no evidence to support the plea, and the jury persist in finding for defendant, there must be a new trial." It is well settled that the application for a new trial is an appeal to the discretion of the court, and that a new trial will always be granted when the court is convinced that injustice has been done, and in this their legal discretion will be guided by the nature and circumstances of each particular case. Justice BULLER says: "The granting of new trials is absolutely in the breast of the court." Bull. N. P. 326. In granting new trials the court knows no limitations (except in some particular cases), but will grant a new trial, as it will tend to the advancement of justice: *Goodwin v. Gibbons*, 4 Burr. 2108; *Rex v. Mawley et al.*, 9 D. & E. 620; *Steinmetz et al. v. Curry*, 1 Dallas 234; *Cowperthwaite v. Jones*, 2 Ibid. 56; *Jordan v. Meredith*, 3 Yeates 318; *Commonwealth v. Eberle*, 3 S. & R. 9.

It is said by Justice LEWIS, in *Geffy v. The Commonwealth*, 2 Grant's Cases 68, that the only exception to this rule is where the defendant is acquitted in a criminal case he shall not be put in jeopardy a second time for the same offence.

In the exercise of this discretion the court may direct a verdict to be set aside when rendered contrary to their direction, without any motion on the part of the counsel, or hearing any argument for or against it.

A court may or may not, in their discretion, hear counsel upon any question of law that may arise in a cause, or may hear or refuse to hear counsel for or against any order which it is discretionary with the court to make. The object of an argument is to convince the judge upon some point on which he may desire information; but if the judge is satisfied with the correctness of his own opinion, and is prepared to decide upon it, he may render his judgment, although the counsel for the party against whom the decision is made, may think that if he had been heard the judgment would have been different.

If the court have the power to set

rigor to its rules, unless it should appear that intermediately the Statute of Limitations will bar the claim.<sup>1</sup>

The other class is thus described by Judge Sharswood:<sup>2</sup> "It is evident that if a new trial were granted in every case in which a party should think that he might have presented his case more advantageously, we might as well say that we would grant a new trial in every case in which either plaintiff or defendant is dissatisfied. There are cases, however, in which a party has been surprised by evidence which he had no reason to expect, in which a new trial will be granted. There is an evident distinction to be drawn, however, between the case of a plaintiff against whose claim the Statute of Limitations has not run, and a defendant. The former has the game in his own hands. If surprised by evidence from the defendant which he is not prepared to meet and rebut, he can and therefore ought to suffer a nonsuit. A defendant has no privilege of that character; and his application to the court for a new trial, under such circumstances, stands upon a different footing. The party plaintiff here elected to take his chance with the jury upon the evidence as it stood, and hence is bound by that election."

"Cases upon the subject of new trials," said the same learned judge, "are not, in the nature of things, of much authority, except as to the mere laying down of the general principles. The general principle upon which this decision rests has been recognised, and it by no means weakens it to show that in some cases a new trial has been awarded to a plaintiff on the ground of surprise. Wherever a plaintiff is so situated that he cannot bring a new action, as when the defendant is beyond the jurisdiction of the court, or his claim is barred by the statute or any other cause, he may show that by suffering a nonsuit he would have irreparably lost the case, it may be in a case in which the costs have been unusually heavy, when especially if they were incurred by the fault or delays of the opposite

aside a perverse verdict and direct a new trial, without motion or argument by the counsel of either party, they have the same right to set aside the verdict and order a new trial after the motion has been made. The court, not the counsel, are charged with the duty of correcting any errors that may be made by the jury, and the court may, in their discretion, perform that duty, even in opposition to the counsel in the cause.

The right of the court is not restricted by the granting of a rule to show cause why a new trial should not be had, to order a new trial as soon as they are satisfied, from their own knowledge, of what occurred on the trial, whether, by the operation of their own minds, before any argument by the counsel, or after argument, that the attainment of justice requires it to be done.

In a court composed of a single law judge, he must determine whether a

new trial should be granted under all the circumstances of the case. He is the court. The judge must satisfy himself whether it is his duty in his judicial capacity as the court, to grant the new trial, and when he has come to a conclusion, the court can decide the question.

It is then the judge, whose action necessarily controls the action of the court, who is to decide upon granting or refusing a new trial. The judge may form his decision from reasoning and reflection out of court. The declaring his opinion and decision when sitting on the bench in court, is the formal manner in which his decision is made known to the parties and the public."

<sup>1</sup> See *Vandergrift v. Malcomson*, *post*, p. 608.

<sup>2</sup> *Martin v. Marvin*, D. C. P., December 20th 1851, 1 Phila. 280.

party, the rule ought not to be applied. In short, to make a case in regard to the rules of granting new trials, of binding authority, we should have to know a variety of circumstances in regard to it, which cannot always be gathered from the printed report."

If there is a material misdirection in the charge of the court, it is sufficient ground for reversal though no instructions were asked, and it is error to confine the attention of the jury to one view of the case where there is more than one which they should consider.<sup>1</sup>

A motion for a new trial is not a waiver of a bill of exceptions, though founded upon the same matter for which the bill is taken.<sup>2</sup>

The opinion of the court below on a motion for a new trial is not part of the record: nor can the record be amended by a fact stated therein.<sup>3</sup> The refusal of the court below to grant a new trial is not assignable as error.<sup>4</sup>

The practice with regard to new trials will be considered under the following heads:—<sup>5</sup>

1. Misdirection of court.
2. Error in admission or rejection of evidence.
3. Verdict against law.
4. Verdict against evidence.
5. Irregularity of jurors.
6. Misconduct by prevailing party.
7. After-discovered evidence.
8. Absence.
9. Want of notice.
10. Mistake.
11. Surprise.
12. Irregularity in impannelling jury.
13. Unsuitable damages.
14. Time and form of notice.
15. Terms and costs.

1. *Misdirection of court.*

Any misdirection by the court trying the case, in point of law, on matters material to the issue, is a good ground for a new trial;<sup>6</sup> and such misdirection, even upon one point, is sufficient, although the jury may have properly found their verdict upon another point, as to which there was no misdirection;<sup>7</sup> though it is said, that if, on the trial of a civil issue, the court see that justice has been done

<sup>1</sup> Garrett v. Gonter, 6 Wright 143.

<sup>2</sup> Shaeffer v. Landis, 1 S. & R. 449.

<sup>3</sup> Cathcart v. Com., 1 Wright 108.

<sup>4</sup> Ibid.

<sup>5</sup> The analysis, and a considerable part of the references of this section, are taken from Wh. Am. Crim. Law, 1st ed., p. 636.

<sup>6</sup> Doe d. Bath v. Clarke, 3 Hodg. 49; Doe d. Read v. Harris, 1 Will., Wol. & D. 106; Haine v. Davey, 4 Ad. & El. 892; 6 Nev. & Man. 356; 2 Har. & Wol. 30; Lyons v. Tomkies, 1 Mee. & W. 603; Anon., 6 Mod. 242; How v. Stride, 2 Wils. 269; 10 Johns. R. 447;

5 Day 479; 5 Mass. 487; Wilson v. Rastall, 4 T. R. 753; 4 Conn. 356; 3 Cranch 298; Calcraft v. Gibbs, 5 T. R. 19; Crofts v. Waterhouse, 3 Bingham 319; Young v. Spencer, 10 Barn. & C. 145; Holiday v. Atkinson, 5 Ibid. 501; Boyden v. Moore, 5 Mass. 365; Wardell v. Hughes, 3 Wendell 418; Baylies v. Davis, 1 Pick. 206; Lane v. Crombie, 12 Ibid. 177; Doe v. Paine, 4 Hawks 64; West v. Anderson, 9 Conn. 107; McFaden v. Parker, 3 Yeates 496.

<sup>7</sup> Doe d. Read v. Harris, Will., Wol. & D. 106; People v. Bodine, 1 Denio 280.

between the parties, they will not set aside the verdict, nor enter into a discussion of the question of law.<sup>1</sup> Error committed by the court in the allowance or refusal of challenges,<sup>2</sup> or the allowance or refusal of a motion, either for continuance,<sup>3</sup> or of any other peremptory motion,<sup>4</sup> will be ground for a new trial.

The due degree of weight to be given by a judge directing the jury, to particular evidence, which has been properly admitted, must be left to his own discretion; and his discretion, in that respect, will not be revised,<sup>5</sup> though, if the court instruct a jury that they may indulge a presumption not warranted by the evidence, a new trial will be awarded.<sup>6</sup>

A new trial will not be granted on a point of law, not made at the trial, unless perhaps the party would be without remedy otherwise.<sup>7</sup> Where a judge falls into an error of fact, in supposing evidence to be given which, although treated by counsel as offered, was not really so, a new trial will be granted.<sup>8</sup> It is never a reason for a new trial that the judge refused to nonsuit the plaintiff. If, upon the trial, the plaintiff fails to make out his case, the judge should be requested so to charge the jury.<sup>9</sup> A new trial will not be granted merely because a case is a proper one for the jury to view the premises, which they have not done.<sup>10</sup> The omission, by the judge, in summing up, specifically to leave to the jury a point made in the course of the trial (his attention not being expressly called to it), is no ground for a motion for a new trial, if the whole of the case was substantially left to them.<sup>11</sup>

Where, however, from the absence of proper instructions, the jury fall into error, a new trial will be granted.<sup>12</sup> But the judge cannot be required to give an opinion on a mixed question of law and fact,

<sup>1</sup> *Edmonson v. Machell*, 2 T. R. 4; *How v. Strode*, 2 Wils. 269; *Smith v. Page*, 2 Salk. 644; *Denly v. Masarine*, *Ibid.* 646; *Cox v. Kitchen*, 1 Bos. & P. 338; *Brazier v. Clap*, 5 Mass. 1; *Remington v. Congdon*, 2 Pick. 310; *State v. Tudor*, 5 Day 329; *Rogers v. Page*, *Brayt* 169; *Breckenridge v. Anderson*, 3 J. J. Marshall 710; *Ingraham v. Ins. Co.*, Const. R. 717; *Johnson v. Blackman*, 11 Conn. 32; *Coit v. Tracy*, 9 *Ibid.* 1; *Peters v. Bamhill*, 1 Hill's S. C. 234.

<sup>2</sup> *Commonwealth v. Leshner*, 17 S. & R. 155; *People v. Mather*, 4 Wendell 229; *People v. Bodine*, 1 Denio 281; *Heath's Case*, 1 Robinson 735; *People v. Rathbun*, 21 Wendell 509; *Armistead v. Commonwealth*, 11 Leigh 657; though see *Henry v. State*, 4 Humphrey 549.

<sup>3</sup> *State v. Fyles*, 3 Brevard 304; *Vance v. Commonwealth*, 2 Va. Cases 162; *Commonwealth v. Gwatkin*, 10 Leigh 687; *Bledsoe v. Commonwealth*, 6 Rand. 674; *People v. Vermilyea*, 7 Cowen 369.

<sup>4</sup> *Com. v. Church*, 1 Barr 105.

<sup>5</sup> *Post*, chap. XXII.; *Attorney-General v. Good*, M'Clel. & Y. 286; 4 Ch. Gen. Practice 42; *People v. Genung*, 11 Wendell 18.

<sup>6</sup> *Post*, chap. XXII.; *Harris v. Wilson*, 1 Wendell 511; *Haine v. Davey*, 4 Ad. & El. 899; 4 Wendell 639; 10 *Ibid.* 461; *Levingsworth v. Fox*, 1 Bay. 520; *Handly v. Harrison*, 3 Bibb 481.

<sup>7</sup> *Peters v. Phoenix Ins. Co.*, 3 S. & R. 25.

<sup>8</sup> *Bodine v. Railroad Co.*, D. C. C. P., 7 Leg. Int. 19, 1 Phila. Rep. 28, s. c.

<sup>9</sup> *Shields v. Windsor*, D. C. C. P., 7 Leg. Int. 110, 1 Phila. Rep. 72, s. c.

<sup>10</sup> *Phillips v. Kritzer*, D. C. C. P., 7 Leg. Int. 7, 1 Phila. Rep. 19, s. c.

<sup>11</sup> See Wh. Dig. "Error;" *Robinson v. Gleadow*, 2 Scott 250; *Den v. Sinnamon*, 4 Halst. 149.

<sup>12</sup> Wh. Dig. "Error;" *Morrison v. Muspratt*, 12 Moore 231; *Calbreath v. Gracey*, 1 Wash. C. C. R. 198; *Page v. Pattee*, 6 Mass. 459; *Dunlap v. Patterson*, 5 Cowen 243; see *Scott v. Lunt*, 7 Peters 596.



and a refusal to do so is no error. In an action for maliciously and without reasonable or probable cause, charging the plaintiff with felony before a magistrate, it appeared that the plaintiff had lived in the service of the defendant, and, on being discharged, took away with her a trunk and bag, the property of the defendant; that on the following day, the defendant wrote to desire the plaintiff to return those articles, stating, that unless she did so, he would, on the following Monday, cause her to be apprehended; that the letter being, in consequence of the plaintiff's absence, unanswered, the defendant obtained a warrant for the apprehension of the plaintiff, and carried her before a magistrate, who dismissed her, the defendant declining to press the charge; the judge before whom the cause was tried left it to the jury to say whether or not the defendant had reasonable or probable cause for apprehending the plaintiff, and whether he was actuated by malice or not, and it was decided that this direction was proper, and that the judge was not bound to take upon himself to decide as to whether or not there was reasonable or probable cause, it being a mixed question of law and fact.<sup>1</sup> In this country, however, it has been more than once held, that it is the duty of the court exclusively to determine whether the circumstances proved by the defendant amount to probable cause, leaving it to the jury to decide whether such circumstances are in proof or not.<sup>2</sup>

Where the court, on a motion for judgment for want of a sufficient affidavit of defence, treated certain evidence necessary to make out the plaintiff's case as immaterial, a new trial will be granted, if its non-production at the trial was in consequence of such mistake.<sup>3</sup> A new trial will be granted, if the evidence be nearly equipoised, where improper evidence was admitted on the trial, and subsequently stricken out.<sup>4</sup> A new trial will be granted, where the court left to the jury upon parol evidence the meaning of certain words in a written instrument.<sup>5</sup> A new trial may be granted, where the court charged the jury under a misapprehension of a fact stated by a witness, and the nature of the case made the result important.<sup>6</sup>

A new trial will be granted, where the court's instruction to the jury upon a question of ratification was such that it might have misled them.<sup>7</sup> A new trial was granted, where the judge who tried the case disagreed with the jury in their finding of a material fact, and his colleagues differed as to the weight of the evidence.<sup>8</sup> A conflict of testimony must be settled by the jury.<sup>9</sup> The finding of a

<sup>1</sup> *Macdonald v. Booke*, 2 Scott 359; *Shaw v. Wallace*, 2 Stew. & Porter 193; see 1 Greenl. R. 135; 4 Ch. Gen. Practice 40.

<sup>2</sup> Wh. Dig. "Error," IV. (b), "Courts," I.; *Whitney v. Peckham*, 15 Mass. 243; *Munns v. Dupont*, 3 Wash. C. C. R. 32.

<sup>3</sup> *Morris v. Easby*, D. C., 2 Phila. Rep. 301.

<sup>4</sup> *Rahlfing v. Heydrick*, D. C. Phila., *SHARSWOOD*, P. J., 17 Leg. Int. 12, 4 Phila. Rep. 3, s. c.

<sup>5</sup> *Miller v. The Church*, D. C. Phila., *SHARSWOOD*, P. J., 17 Leg. Int. 12, 4 Phila. Rep. 4, s. c.

<sup>6</sup> *Edwards v. Edwards*, D. C. Phila., *HARE*, J., 17 Leg. Int. 28, 4 Phila. Rep. 11, s. c.

<sup>7</sup> *Johann v. Inman*, C. P. Phila., *LUDLOW*, J., 17 Leg. Int. 190.

<sup>8</sup> *Emlen v. Robinson*, D. C. Phila., *SHARSWOOD*, P. J., 17 Leg. Int. 222, 4 Phila. Rep. 92, s. c.

<sup>9</sup> *Ayres v. Rubicam*, 3 Phila. Rep. 328.

jury, corroborated by another verdict, which though against another party was on the same contract, will not be set aside.<sup>1</sup>

Where evidence has been improperly admitted, and the court warn the jury to exclude it from consideration in determining their verdict if it appear, throwing the incompetent part out, that the testimony on both sides is nearly equipoised, the court will direct a new trial.<sup>2</sup> A misapprehension by the court of the meaning of a witness, and a direction to the jury following this misapprehension, and affected by it, is sufficient reason for granting a new trial, although in the view of the court the difference is immaterial.<sup>3</sup> A new trial granted where the defendant had been refused a continuance for the purpose of filing a bill of discovery, although guilty of prior laches.<sup>4</sup> A new trial will be granted, where the colleagues of the judge who presided at Nisi Prius differ upon the question of the weight of the evidence, and where he himself disagreed with the jury in their finding of a material fact.<sup>5</sup> Even where a verdict seems to do substantial justice and give the plaintiff compensation for his loss, the court cannot allow it to stand if it is wrong, when judged with reference to the contract of the parties.<sup>6</sup>

## 2. *Error in admission or rejection of evidence.*

Though there is exceptionable testimony, yet if there be sufficient legal evidence to support the verdict, and justice appear to have been done, the verdict will not be set aside;<sup>7</sup> and the same rule applies where legal evidence has been excluded, but where, had it been admitted, it would have produced no variation in the result;<sup>8</sup> though, in Pennsylvania, it may be questioned whether this liberality has been extended beyond testimony which was only irrelevant.<sup>9</sup> In such cases, however, the court must see that the evidence did not weigh with the jury in forming their opinion, or that an opposite verdict, given upon the remainder of the evidence, must have been set aside as against evidence.<sup>10</sup> And Denman, C. J., went so far once as to say to the counsel who had put in such inadmissible evidence: "It is not enough for you to say that the reception of this evidence could have made no difference; you should have taken care not to put in bad evidence. The alleged unimportance of a piece of evidence improperly rejected or admitted, is no ground for refusing to send a case down for a new trial."<sup>11</sup>

Where three actions against the same defendant were tried by the same jury, and the plaintiff in one of the actions gave evidence applicable to a case in which he was not a party, but which tended

<sup>1</sup> Church v. Pharo, 3 Phila. Rep. 545.

<sup>2</sup> Rahlfling v. Heidrick, 4 Ibid. 3.

<sup>3</sup> Edwards v. Edwards, Ibid. 11.

<sup>4</sup> Skerry v. Tyson, Ibid. 20.

<sup>5</sup> Emlen v. Robinson, Ibid. 92.

<sup>6</sup> Rothermel v. Michler, Ibid. 117.

<sup>7</sup> Tullidge v. Wade, 3 Wils. 18; Herford v. Wilson, 1 Taunt. 12; Doe v. Tyler, 6 Bingham 561; Nathan v. Buckley, 2 Moore 153; Smith v. Harmaison, 1 Wash. R. 6; Prince v. Shep-

herd, 9 Pick. 176; Stiles v. Tilford, 10 Wendell 388.

<sup>8</sup> Commonwealth v. Irwin, 2 P. L. J. 329, BELL, J.; Edwards v. Evans, 3 East 451; Fitch v. Chapman, 10 Conn. 8; Landon v. Humphrey, 9 Ibid. 209.

<sup>9</sup> Boyd v. Boyd, 1 Watts 366, ROGERS, J.

<sup>10</sup> De Butzen v. Farr, 5 N. & M. 617.

<sup>11</sup> Ibid. 618.

to swell the damages in his own case, the court granted a new trial in all the cases.<sup>1</sup>

It is error to submit a particular fact in a cause to the jury, and after the fact has been found by them to enter judgment for the party against whom it was found, on the ground that the evidence was insufficient to establish it.<sup>2</sup> If a fact be improperly found, the proper remedy is a new trial.

### 3. *Verdict against law.*

Wherever the finding of the jury, in point of law, is against the charge of the court, the verdict will be set aside.<sup>3</sup>

Where the court has instructed the jury to disregard evidence which afterwards appears to have been improperly admitted, and the jury does not follow the instruction;<sup>4</sup> where the jury finds for the plaintiff, against the charge of the court, that the Act of Limitations barred the action;<sup>5</sup> and generally, where the verdict is for the defendant against law, and the directions of the court;<sup>6</sup> new trials will be granted.

Although a judge may be wrong in his charge to the jury, even in stating to them that there was no evidence upon a particular point, when in fact there was some evidence, yet if the jury find against the charge, a new trial will be granted.<sup>7</sup>

Where a jury, in a very hard action, disregard an instruction that plaintiff is entitled to nominal damages, and find for defendant, it is not sufficient ground for a new trial.<sup>8</sup>

### 4. *Verdict against evidence.*

Where the verdict in the opinion of the court is against the weight of evidence, it will be set aside, if injustice be thereby done; and this is particularly the case where one of the material allegations of the succeeding party's case remains unproved.<sup>9</sup> If, however,

<sup>1</sup> *Consequa v. Willing*, 1 Pet. C. C. 225, 231.

<sup>2</sup> *The North American Oil Co. v. Forsyth*, 12 Wright 291.

<sup>3</sup> *Pierce v. Woodward*, 6 Pick. 172; *Payne v. Trevesant*, 2 Bay. 23; *Hine v. Robbins*, 2 Conn. 342; *Dillingham v. Snow*, 5 Mass. 547; *Cunningham v. Magoun*, 18 Pick. 13; *Hall v. Downs*, Brayt. 168; *U. S. v. Duval*, Gilpin 356; *Ross v. Eason*, 1 Yeates 14; *Bank v. Marchand*, Charlton 247; *Moore v. Cherry*, 1 Bay. 269; *Thomas v. Brown*, 1 McCord 557; *Mears v. Moor*, 3 Ibid. 282; *Ibid.* 131; *Hyckman v. Shotholt*, Dyer 279; *Watkins v. Oliver*, Cro. Jac. 558; *Bright v. Eynon*, 1 Burr. 390; *Edie v. East India Co.*, 2 Ibid. 1216; *Hodgson v. Richardson*, 1 T. R. 167; *Tindal v. Brown*, 1 W. Blac. 463; *Farrant v. Olmuis*, 3 Barn. & Adol. 693; *Turner v. Meymott*, 1 Bingham 158; *Gibbons v. Phillips*, 8 Barn. & C. 437. In Pennsylvania and Virginia, upon the trial of a defendant charged with a criminal offence, he may demur to the evidence,

but the commonwealth will not be compelled to join in the demurrer: *Commonwealth v. Parr*, 5 W. & S. 345; *Doss v. Commonwealth*, 1 Grattan 557.

<sup>4</sup> *Unangst v. Kraemer*, 8 W. & S. 391.

<sup>5</sup> *Cresman v. Caster*, 2 Browne 123.

<sup>6</sup> *Ross v. Eason et al.*, 1 Yeates 14; *Emmet v. Robinson*, 2 Ibid. 514.

<sup>7</sup> *Flemming v. Marine Ins. Co.*, 4 Wh. 59. See *Willis v. Bucher*, 2 Binn. 467; *Keble v. Arthurs*, 3 Ibid. 26; *Commissioners v. Ross*, Ibid. 520.

<sup>8</sup> *Mishler v. Baumgardner*, C. P. Lancaster, per Lewis, P. J., 8 P. L. J. 304; *Todd v. Jones*, D. C. C. P., 7 Leg. Int. 42, 1 Phila. Rep. 45, s. c.; *Wharton v. Wilson*, 2 Ibid. 267.

<sup>9</sup> *Emmet v. Robinson*, 2 Yeates 514; *Kohne v. Ins. Co.*, 1 Wash. C. C. R. 123; *Dayrolles v. Howard*, 3 Burr. 1385; *R. v. Malden*, 4 Ibid. 2135; *Farriant v. Olmuis*, 3 Barn. & Ald. 692; *Corbett v. Brown*, 8 Bingham 33; *U. S. v. Duval*, Gilpin 356; *State v. Sims*, 2 Bailey 29; *State v. Hooper*, Ibid. 37; *State v.*

there be conflicting evidence on both sides, and the question be one of doubt, it seems the verdict will generally be permitted to stand.<sup>1</sup> It has been said, that though the judge who tried the cause inclined that the weight of evidence was with the plaintiff, yet it is no ground for awarding a new trial that the jury have differed from him in opinion;<sup>2</sup> but the cases were frequent, as has just been seen, where new trials are granted upon the mere certificate of the judge trying the cause, that he is dissatisfied with the result.<sup>3</sup>

Although the court have a right to grant a second new trial, yet it must be a very extraordinary case to induce a judge to grant a new trial after two concurring verdicts on matters of *fact*;<sup>4</sup> though it is otherwise where matter of law has been disregarded by the jury.<sup>5</sup> The verdict of a jury in an action for *tort* should be final, unless it is at variance, not only with the weight of the evidence, but with all the evidence by which they should be guided.<sup>6</sup> Where a verdict has been given against the weight of the evidence from "a natural prejudice to turn the plaintiff out of court upon the misconception of his form of action merely," it will be set aside.<sup>7</sup> A new trial will be granted, where a verdict is not accordant with the contract of the parties, though it seems to do substantial justice and give the plaintiff compensation for his loss.<sup>8</sup> A new trial will be granted, where a verdict is given differing from a former verdict, and in disregard of evidence not given at first trial.<sup>9</sup> On a motion for a new trial, the court must judge not only of the competency, but of the effect of evidence; and the question is not, whether on

Fisher, 2 N. & M. 261; *Respublica v. Lacaze*, 2 Dallas 118; *Wait v. McNeil*, 7 Mass. 261; *Curtis v. Jackson*, 13 Ibid. 507; *Bartholomew v. Clark*, 1 Conn. 472; *Cockfield v. Daniel*, 1 Rep. Con. Ct. 193; *King v. Huntington*, Ibid. 162; *Starke v. Cockerd*, 2 Ibid. 337; *Kinnie v. Kinnie*, 4 Conn. 102; *Talcott v. Wilcox*, 9 Ibid. 134; *Bacon v. Parker*, 12 Ibid. 212; *Zuber v. Geigar*, 2 Yeates 522; *Swearingen v. Birch*, 4 Ibid. 322; *Thomas v. Brown*, 1 McCord 557; *Newson v. Lycar*, 3 J. J. Marsh. 440.

<sup>1</sup> *Douglass v. Tousey*, 2 Wend. 352; *Jeffreys v. State*, 3 Murphey 480; *Motley v. Montgomery*, 2 Bailey 11; *Laval v. Cromwell*, Const. Rep. 593; *Darby v. Calhoun*, 1 Rep. Con. Ct. 398; *Miller v. McBurney*, Ibid. 237; *Cohen v. Simmons*, Ibid. 446; *Caldwell v. Barkley*, 2 Ibid. 452; *Palmer v. Hyde*, 4 Conn. 426; *Laffin v. Pomeroy*, 11 Ibid. 440; *Trowbridge v. Baker*, 1 Cowen 251; *Winchell v. Latham*, 6 Ibid. 682; *McKnight v. Wells*, 1 Miss. 13; *Clasky v. January*, *Hardin* 539; *Nelson v. Chalfant*, 3 Litt. 165; *Lee v. Banks*, 4 Ibid. 11; *Johnson v. Davenport*, 3 J. J. Marshall 390; *Reid v. Langford*, Ibid. 420; *Creel v. Bell*, 2 Ibid. 309; *Talbot v. Talbot*, Ibid. 3; *Fitzgerald v. Barker*,

4 Ibid. 398; *Swain v. Hall*, 3 Wilson 45; *Gregory v. Tuffts*, 1 Crom. M. & R. 310; 1 Camp. 450; *Melin v. Taylor*, 2 Hodg. 125; 3 Bing. N. C. 109; *Empson v. Fariford*, 1 Wilm. Woll. & Dav. 10; *Stanley v. Wharton*, 8 Price 301; *Lofft* 147; *Hankey v. Trotman*, 1 W. Bla. 1; *Wilton v. Stephenson*, 2 Price 282; *Farewell v. Chaffey*, 1 Burr. 54; *Baugh v. Monaghan*, 2 Phila. Rep. 90; *McIntosh v. The Church*, 3 Ibid. 33.

<sup>2</sup> *Campbell v. Sproat*, 1 Yeates 327; *McIntire v. Cunningham*, Ibid. 363.

<sup>3</sup> *Swearingen v. Birch*, 4 Yeates 322; *Pringle v. Gaw*, 6 S. & R. 298.

<sup>4</sup> *Willis v. Bucher*, 2 Binn. 467; *Keble v. Arthurs*, 3 Ibid. 26; *Davies v. Roper*, 4 Am. Law Reg. 504; *Murray v. Simpson*, 2 Phila. Rep. 174; *Church v. Pharo*, 3 Ibid. 545.

<sup>5</sup> *Willis v. Bucher*, 2 Binn. 467; *Keble v. Arthurs*, 3 Binn. 26; *Commissioners of Berks v. Ross*, Ibid. 520.

<sup>6</sup> D. C., *McIntire v. Stringer*, 3 Phila. Rep. 302.

<sup>7</sup> D. C., *McIntosh v. The Church*, Ibid. 33.

<sup>8</sup> *Rothermel v. Mitchell*, D. C. Phila. HARE, J., 17 Leg. Int. 332.

<sup>9</sup> *Yocum v. Morice*, Ibid., 4 Phila. Rep. 414, s. c.

the new facts before them, the jury *might* not be *induced* to give a contrary verdict, but whether the legitimate effect of the whole evidence would require them to do so.<sup>1</sup> A verdict for the whole amount of the plaintiff's claim in disregard of his own and the defendant's evidence will be set aside, unless a *remittitur* for the excess be entered.<sup>2</sup>

##### 5. *Irregularity of jurors.*

New trials were granted where the jury received new evidence after leaving the bar;<sup>3</sup> where parol evidence had been allowed to be given of the contents of a deed and of a will, without previous notice to the defendant to produce it, and where it appeared that two of the jury had testified to their brethren on the question in issue, after the jury had withdrawn;<sup>4</sup> and where it appeared by the affidavit of one of the jurors, that after the jury had received the charge of the court, and retired to consider of their verdict, the foreman of the jury declared that the prevailing party had satisfied him with regard to a difficulty in the plaintiff's account, in a con-

<sup>1</sup> *Martin v. Marvine*, 9 Leg. Int. 2, 1 Phila. Rep. 280, s. c. The practice of the District Court of Philadelphia, in this respect, is thus stated by Judge SHARSWOOD: *Hansell v. Lutz*, Saturday, March 13th 1852, 1 Phila. Rep. 340. Motion for a new trial. There is no question so embarrassing to a judicial tribunal, as to determine when it is or is not their duty to interfere with the verdict of a jury, upon a mere question of the weight of evidence. The single opinion of one man upon a mere question of fact, ought not, except in a clear case, to weigh down that of twelve. Evidence presents itself to different minds in different lights, and in no case is the remark more applicable than upon a question of fraud. Now there certainly were many circumstances, besides the incongruous and unexplained declarations of the plaintiff, which were calculated to confirm the impression these declarations were likely to produce. The fact that the mortgage was of the same date as the deed of the mortgagor, for a sum much larger than the property was worth, or the mortgagor had given for it, and the hot haste with which the mortgage was sued out the moment the sale took place, before the time for which the interest was paid in advance had expired—linked with the fact that the mortgagor, immediately upon the sheriff's sale, had given notice to the tenant to pay no rent to the purchaser, as he intended to get the property back—were certainly circumstances calculated to fasten collusion and fraud. When all this is taken into consideration, with the fact that no evidence

whatever was given of actual consideration and *bona fides*, but the plaintiff was compelled to rely upon the paper alone, it cannot, in any view, be a case in which the verdict of the jury, contrary to the *prima facie* case presented by the mortgage, ought to be set aside. It may be unfortunate that the plaintiff could only prove the consideration and *bona fides* of the papers by a witness clearly incompetent to testify. It is not the first just cause—if it be a just cause—which has been lost by the arbitrary rule which excludes a witness pecuniarily interested in the result, and permits the admission of the testimony of a father in favor of a son, whose temptation to color and distort is as great, if not greater, than one whose interest is mere money. As to the allegation of surprise, the game was in the plaintiff's own hands. He might have suffered a nonsuit; but as he has elected to take his chance with the jury upon the evidence as presented, we must, in consistency with established principles, hold him bound by that election. Rule refused.

<sup>2</sup> D. C., *Hill v. The City*, 2 Phila. Rep. 351.

<sup>3</sup> *Brunson v. Graham*, 2 Yeates 166.

<sup>4</sup> *Bradley v. Bradley*, 4 Dallas 112. [But in *Cluggage v. Swan*, 4 Binn. 157, it is said by YEATES, J., "This case is reported erroneously. The *plaintiff* obtained judgment on his verdict, the court being divided in opinion, and it is thus entered on the record. Nothing dropped from either of the members of the court respecting the conduct of the jury."] ]



versation he had with him out of court, and after the jury had been sworn.<sup>1</sup> A new trial will be granted where one of the jurors on the panel has been guilty of the indiscretion of talking with a witness of one of the parties before the cause began, though before he was called into the box.<sup>2</sup>

But it is not sufficient ground to grant a new trial, that one of the jurors, after they had agreed upon a verdict for the plaintiff, sealed it up and separated, heard a third person express his opinion that the plaintiff ought to recover;<sup>3</sup> nor that the jury, in an action of *tort*, determined the amount of damages by each setting down the particular sum he thought just, and then dividing the aggregate by the number of jurymen, unless some fraudulent abuse of the mode adopted appears;<sup>4</sup> nor that one of the jurors was an alien;<sup>5</sup> nor that a special juror was struck off, and then sworn as a talesman, if done with the knowledge of the party who struck him off;<sup>6</sup> nor that a brother-in-law of the plaintiff was sworn on the jury, and the plaintiff's attorney agreed to waive the juror, and swear another in his room, which the defendant refused, no injustice having been done by the verdict.<sup>7</sup>

There must be clear and full proof of the juror's having eaten and drunk at the expense of the party, and undue management, or a criminal intention must appear, or the court will not grant a new trial.<sup>8</sup> A new trial will not be granted where it appears that a juror had betted on both sides of a cause, unless an evident bias was produced, nor where some of them have expressed an opinion on the opening of a cause.<sup>9</sup>

The English rule now is, that a juror is inadmissible to impeach the verdict of his fellows, and the courts of this country incline to the same result,<sup>10</sup> though the affidavits of jurors will be entertained for the purpose of explaining, correcting, or enforcing their verdict.<sup>11</sup> Thus where a doubt existed, in consequence of confusion in the court-room, as to what the exact verdict was, the affidavits of jurors and bystanders were received for the purpose of showing the facts

<sup>1</sup> Ritchie v. Holbrooke, 7 S. & R. 458.

<sup>2</sup> Mench v. Bolbach, 4 Phila. Rep. 68.

<sup>3</sup> Willing v. Swasey, 1 Browne 123.

<sup>4</sup> Cowperthwaite v. Jones, 2 Dallas 55. In *assumpsit*, the rule seems otherwise: Zuber v. Geigar, 2 Yeates 522.

<sup>5</sup> Hollingsworth v. Duane, C. C., 4 Dallas 353.

<sup>6</sup> Jordan v. Meredith, 3 Yeates 318; s. c., 1 Bin. 27.

<sup>7</sup> Spong v. Leasher, 1 Yeates 326.

<sup>8</sup> Goodright v. McCousland, 1 Yeates 373.

<sup>9</sup> Ibid.

<sup>10</sup> Cluggage v. Swan, 4 Binn. 150; Willing v. Swasey, 1 Browne 123; Dana v. Tucker, 4 Johns. 487; Sergeant v. Deniston, 5 Cowen 106; *Ex parte* Caykendall, 6 Ibid. 53; People v. Columbia, &c., 1 Wend. 297; State v. Freeman, 5 Conn. 348; Cochran v.

Steel, 1 Wash. 79; Price v. Tugna, 1 Hen. & Mun. 385; Robbins v. Wendover, 2 Tyler 11; Bladen v. Cockey, 1 Har. & McHenry 230; State v. Doom, Charlton 1; Taylor v. Giger, Hardin 586; Steele v. Logan, 3 A. K. Marshall 394; Heath v. Conway, 1 Bibb 398; Den v. McAllister, 2 Halst. 46; Johnson v. Davenport, 3 J. J. Marshall 390; Briggs v. Eggleston, 14 Mass. 245; Commonwealth v. Drew, 4 Ibid. 439; Forester v. Guard, Breese 49; though see Sawyer v. Stephenson, Ibid. 6; Grinnill v. Phillips, 1 Mass. 530; Hudson v. State, 9 Yerger 408; Crawford v. State, 2 Ibid. 60.

<sup>11</sup> Cogan v. Ebdon, 1 Burr. 383; R. v. Woodfall, 5 Ibid. 2667; Dana v. Tucker, 4 Johns. 487; Jackson v. Dickenson, 15 Ibid. 309; Cochran v. Street, 1 Wash. Rep. 79.

of the case, though all reference was excluded as to the motives or intentions with which such verdict was agreed to, or the circumstances attending the deliberations which led to it.<sup>1</sup> And so it is held that the affidavit of a juror is admissible to prove misconduct of one of the parties.<sup>2</sup>

6. *Misconduct by prevailing party.*

Any misconduct by the prevailing party, intended to affect the jury, and tending so to do, will be cause for a new trial.<sup>3</sup> A new trial will be granted, because one of the witnesses of the party for whom the jury found, conversed about the case with a juror, before he was called into the box.<sup>4</sup> Evidence that a party, by exhibiting papers at places where the jury boarded, had been attempting to bias and influence them, has been held sufficient to sustain the motion.<sup>5</sup> A new trial was granted where the plaintiff delivered a paper to the jury relating to his demand, without consent or leave of the court.<sup>6</sup> Where papers, not in evidence, are surreptitiously handed to the jury, the verdict will be avoided; and the same result will take place where it appears that a witness on one side has been spirited away by the opposite party.<sup>7</sup> Such efforts, however, must be traced to the party or his agents.<sup>8</sup> In fine, any unfair trick, if successful, will be ground for the motion.<sup>10</sup>

The declaration by counsel on trial on his own knowledge, of a fact not proven in the case, is a sufficient cause for a new trial, if the verdict goes in favor of the party through whom such declarations are made.<sup>11</sup> Where, however, this irregularity is induced by a prior irregularity of the opposite party, the rule is otherwise.<sup>12</sup> The

<sup>1</sup> *R. v. Woodfall*, 5 Burr. 2667; *R. v. Simons*, Sayre 35.

<sup>2</sup> *Ritchie v. Holbrooke*, 7 S. & R. 458.

<sup>3</sup> 2 Hale, P. C. 303; *State v. Hascall*, 6 N. Hamp. 352; *Knight v. Inhabitants, &c.*, 13 Mass. 218; *Lee's Rep. Tem. Hardwicke* 116; *Bennett v. Howard*, 3 Day 223; *Perkins v. Knight*, 2 N. Hamp. 474; *Jeffries v. Randall*, 14 Mass. 205; *Amherst v. Hadley*, 1 Pick. 38, 42; *Ritchie v. Holbrooke*, 7 S. & R. 458; *Metcalf v. Dean*, Cro. Eliz. 189; *Thompson v. Mallet*, 1 Bay. 94; *Knight v. Inhabitants*, 13 Mass. 218; *Blaine v. Chambers*, 1 S. & R. 169; *Cottle v. Cottle*, 6 Greenl. 146.

<sup>4</sup> *Mench v. Bolbach*, D. C. Phila., HARE, J., 17 Leg. Int. 132, 4 Phila. Rep. 68, s. c.

<sup>5</sup> *State v. Hascall*, 6 N. Hamp. 352; *Coster v. Merest*, 3 Brod. & Bing. 272; 7 Moore 87; *Spenceley v. De Willot*, 7 East 108.

<sup>6</sup> *Sheaff v. Gray*, 2 Yeates 273.

<sup>7</sup> Co. Lit. 272; *Graves v. Short*, Cro. Eliz. 616; *Palmer* 325.

<sup>8</sup> Bull. N. P. 328.

<sup>9</sup> *Grovenor v. Fernwick*, 7 Mod. 156.

<sup>10</sup> *Anderson v. George*, 1 Barr 352; *Graham on New Trials* 56; *Bodington*

*v. Harris*, 1 Bing. 187; *Jackson v. Waterford*, 7 Wend. 62; *Hylliard v. Nickols*, 2 Root 176; *Niles v. Brackett*, 15 Mass. 378.

<sup>11</sup> *Fulmer v. Scott*, D. C. C. P., December 1848. See also *ante*, 231.

<sup>12</sup> *Hart v. Dickerson*, D. C., Saturday, July 8th 1848. Rule for a new trial. *Per curiam*. We have had considerable difficulty in this case, arising not so much from the verdict itself as from the irregular introduction of a fact in the course of the trial, which was calculated to have undue weight with the jury, but which really had nothing to do with the merits. Where the plaintiff is guilty of such an irregularity, as, for example, by stating a former verdict or award in his favor, the proper remedy of a defendant is to ask that the jury may be discharged and the cause continued. It is evident, however, that this cannot be applied to the case of a defendant who, by that means, may for ever postpone the trial. However, in such a case, it ought to appear that the immaterial fact had been before the jury only in consequence of the irregularity committed by the party. Here the irregular state-

court below may grant a new trial, if the counsel in summing up misstate the evidence to the jury, but their refusal so to do is not the subject of review on writ of error.<sup>1</sup> A new trial will be granted where counsel argue concerning evidence excluded by the court, notwithstanding repeated admonitions by the court against doing so.<sup>2</sup> Statements made by a defendant, who tried his case *in propria persona*, in his address to the jury, will not entitle the plaintiff to a new trial.<sup>3</sup> A verdict may be set aside by the court where counsel state and argue from excluded evidence, against the admonition of the presiding judge.<sup>4</sup> Where a very important deposition went out with the jury, the court said: "We are inclined to think upon the evidence submitted to us, accidentally, without the consent, knowledge, or fault of the counsel of either party; but we are afraid that it gave an undue advantage to the plaintiff in the deliberations of the jury, and therefore grant a new trial."<sup>5</sup>

#### 7. *After-discovered evidence.*

Before discussing the several requisites of this ground for a new trial, one or two preliminary points of practice may be noticed.

As a general rule, the party should mention in his affidavit, the witnesses by name, and what he expects to prove by them; and either the witnesses themselves should state, on oath, the evidence

ment was made by the defendant in his opening, and as a mere statement, without any evidence to support it, we are bound to suppose would have had but little if any weight. Still, if it stood upon that alone, we would feel disposed to listen to the objection. When Birkey, however, was on the stand as a witness for the defendant, he was asked, in cross-examination, whether he had not paid the note which he had given, being a part of the same transaction for which the note in suit was in question. This undoubtedly gave the defendant a right to ask why he had paid the note. And his answer, that he had paid it under the terror of a prosecution for perjury, to calm the natural anxieties of an aged parent, thus brought the fact clearly before the jury. Uninfluenced, then, by any considerations arising out of this irregularity, we see no sufficient cause to disturb the verdict. It was put to the jury mainly upon a question of fact, whether Nichuals had possession of the articles sold as agent for the defendant. Both parties agreed in going to the jury upon that question; and in regard to it, the evidence was contradictory. It appeared that, when the bill of sale was handed to defendant, he demanded possession, and the answer made by plaintiff's agent, according to his own testimony, was, that he had all

the possession he could give him. The possession which Nichuals had was under a prior contract with Badger, in which he did not act as defendant's agent, but as vendee himself. It may be doubted whether, with such possession continued in Nichuals, the bill of sale would have protected it from execution for his debts. The bill of sale was not a mere conveyance of the right of the vendor to the chattels, but of the chattels themselves; and in such a case, the vendee has a right to object unless possession can be immediately delivered. He is not bound to accept a lawsuit, even though the right of the vendor be unquestionable. It was then the true question, whether Nichuals, to whom alone possession had been given, was the agent of defendant? This it was incumbent on the plaintiff to make out. We cannot say consistently with the principles upon which the court have hitherto acted, that the weight of the evidence so preponderates that the verdict should be set aside on that account. Rule dismissed.

<sup>1</sup> Thompson v. Barkley, 3 Casey 263.

<sup>2</sup> Emery v. Christman, D. C. Phila., HARE, J., 17 Leg. Int. 332, 4 Phila. Rep. 118, s. c.

<sup>3</sup> D. C., Brown v. Tees, 2 Ibid. 161.

<sup>4</sup> Emery v. Christman, 4 Ibid. 118.

<sup>5</sup> SHARSWOOD, P. J., Carson v. Watson, Ibid. 88.

they can give, or the party should add his own belief to the statement made by the witnesses.<sup>1</sup>

A new trial will not be granted unless depositions be taken to sustain the motion;<sup>2</sup> and the evidence is to be taken before a commissioner, in the presence of counsel, with the liberty to cross-examine.<sup>3</sup>

The rule, in general, will not be granted, if supported only by the affidavit of the party, or one interested. The motion must be accompanied by the affidavit of the newly-discovered witnesses.<sup>4</sup>

The adverse party may show, by affidavits, or cross-depositions, that the witnesses, whose testimony is stated to be material, are wholly unworthy of credit.<sup>5</sup>

A motion for a new trial will not be heard after a judgment has been regularly perfected, although it be on the ground of evidence newly discovered since the judgment.<sup>6</sup> After-discovered evidence, to be of any avail in an application for a new trial, must be material in its object and not merely cumulative, corroborative, or collateral; it must go to the merits of the case and not to any technical ground of defence; and it must be such as ought naturally to produce a different result upon another investigation of the merits of the cause.<sup>7</sup>

(1.) *The evidence must have been discovered since the former trial.*<sup>8</sup>

Where in an action in *assumpsit* on a policy of insurance, the

<sup>1</sup> Kenderdine v. Phelin, Gibson, C. J., 9 Leg. Int. 54, 1 Phila. Rep. 343, s. c.; Hollingsworth v. Napier, 3 Cai. 182; Denn v. Morrell *et al.*, 1 Ham. 382; Brown v. Swan, 1 Mass. 202; Adams v. Ashley, 2 Bibb 287; Andre v. Beinvenu, 1 Mart. Lo. 143; Locard v. Bullitt, 3 Mast. N. S. 170.

<sup>2</sup> Greenwood v. Iddings, D. C. C. P., 7 Leg. Int. 19, 1 Phila. Rep. 28, s. c.

<sup>3</sup> Kenderdine v. Phelin, S. C. N. P., 9 Leg. Int. 54, 1 Phila. Rep. 343, s. c., Gibson, J.

<sup>4</sup> Webber v. Tres, 1 Tyler 441; Noyce v. Huntington, Kirby 282; though see Chambers v. Brown, Cooke 292; Scott v. Willon, Cooks 315.

<sup>5</sup> Williams v. Baldwin, 18 Johns. 489; Pomroy v. Colum. Insurance Co., 2 Caines 260; Parker v. Hardy, 24 Pick. 246.

<sup>6</sup> Jackson v. Chase, 15 Johns. 355; Evans v. Rogers, 2 N. & M. 563; Eckfert v. Des Coudeas, 1 Rep. Con. Ct. 69.

Thus, where judgment had been perfected, a motion for new trial was made, on ground of newly-discovered evidence. From the affidavits that were read, it appeared that the suit was commenced in 1807, and after a trial and verdict for plaintiff, judgment was entered for plaintiff, in October 1816,

there being no order to stay proceedings, but no execution was issued until some time in July 1818; and that the new evidence was not known or discovered by defendant until April 1818. The motion was denied: Jackson v. Chase, 15 Johns. 355. But see Case v. Sheppard, 1 Johns. Cases 245; Birb v. Barlow, 1 Doug. 170.

<sup>7</sup> Commonwealth v. Thompson, 4 Phila. Rep. 215.

<sup>8</sup> Moore v. Phila. Bank, 5 S. & R. 41; Knox v. Work, C. P., 2 Binn. 582; Aubell v. Ealer, *Ibid.*, note (a); Marshall v. Union Ins. Co., 2 Wash. C. C. R. 411; 15 Johns. 293; Vandervoort v. Smith, 2 Caines 55; Hollingsworth v. Napier, 3 *Ibid.* 182; Thurtell v. Beaumont, 8 Moore 612; Palmer v. Mulligan, *Ibid.* 307; Vernon v. Hankey, 2 T. R. 113; Ingram v. Croft, 7 Lo. R. 84; State v. Harding, 2 Bay 267; Dixon v. Graham, 5 Dow 267; Doe v. Roe, 1 Johns. Cas. 402; Williams v. Baldwin, 15 Johns. 489; Brayt 170; 1 Greenleaf 32; Standen v. Edwards, 1 Ves. Jun. 133.

Edwards v. Nichols, D. C., June 14th 1851. Motion for new trial. *Per curiam*. We are asked to grant a new trial in this case, mainly on the ground of after-discovered evidence. But it could not, and has not been pretend

jury rendered a verdict for a total loss, and a new trial was moved for partly on the ground of newly-discovered evidence, but from the affidavit it did not appear that this testimony had been discovered since the last trial, but only that it had arrived in New York since that time; it was held that, as from the nature of the evidence, it must have been discovered as soon as the cause of the loss was known, and as there must have been a want of due diligence in procuring it, the verdict could not be disturbed.<sup>1</sup>

But in another case,<sup>2</sup> where the new evidence consisted of documents, from the custom-house at New York, tending to invalidate some of the testimony given at the trial, and to show the sale was not *bona fide*, but a mere cover, and the goods not neutral property, it was held that this was sufficient ground for granting the motion for a new trial, notwithstanding that the defendant's counsel, upon seeing the New York commission, which had come to hand a few days before the trial, suspected, from some parts of it, that some useful information might be collected.

After-discovered evidence, known to plaintiff at time of trial, is not a sufficient ground for new trial, although he alleges *surprise* because one of defendant's witnesses testimony differed greatly from his previous declarations.<sup>3</sup> After-discovered evidence to entitle the party to a new trial must be such as was not in his power to produce at the trial.<sup>4</sup>

If new evidence be discovered before the verdict is rendered, it should be submitted to the jury; and if neglected, a new trial will not be granted.<sup>5</sup> The judge, at the trial, has discretion as to the admission of evidence out of the regular and usual course. Thus, after the defendant's counsel had summed up, and while the counsel for the plaintiff was speaking, the counsel for defendant informed the judge that he had just discovered, from a paper in the possession of one of the plaintiff's witnesses, that the money was not in fact received, and asked leave to introduce the new evidence; upon the judge's refusal, the court granted a new trial, with costs to abide the event of the suit.<sup>6</sup>

(2.) *It must be such as could not have been secured at the former trial by reasonable diligence on the part of the losing party.*<sup>7</sup>

It is not such newly-discovered evidence, that the party applying

that the alleged evidence could not have been produced at the trial, for though the defendant might not have known what the witness, Glenn, would testify, or, indeed, that he would be called to give evidence at all, he undoubtedly did know that the note sued upon had passed through his hands, and that he alleged that he bought it and sold it to plaintiff. He knew, then, or ought to have known, that his *bona fides*, as the holder, might just as well arise in the case as the *bona fides* of the plaintiff. The rule being perfectly well settled that an endorsee, who has taken

a note with full notice of the equities between the original parties, can shield himself under the *bona fides* of any previous holder. Rule refused.

<sup>1</sup> *Vandevort v. Smith*, 2 Caines 155; *Rogers v. Simons*, 1 Rep. Con. Ct. 143.

<sup>2</sup> *Marshall v. Union Ins. Co.*, 2 Wash. C. C. R. 411.

<sup>3</sup> *Withers v. Ralston*, 3 Phila. Rep. 412.

<sup>4</sup> *Fey v. Ryan*, Ibid. 406.

<sup>5</sup> *Higden v. Higden*, 2 A. K. Marsh. 42; *U. S. v. Gilbert*, 2 Sumner 19, *People v. Vermilyea*, 7 Cow. 369.

<sup>6</sup> *Mercer v. Sayre*, 7 Johns. 306.

<sup>7</sup> *Moore v. Phila. Bank*, 5 S. & R. 41;

for a new trial could not procure in time the witness whom he seeks to introduce, as will entitle him to a new trial. He should have applied to the court for a postponement; and if he has gone to the trial without the testimony, a new trial will not be granted for the purpose of letting in such evidence.<sup>1</sup> Nor is the absence of a witness who had not been subpoenaed, a good cause for granting a new trial;<sup>2</sup> but it seems that the sudden illness of a witness is.<sup>3</sup> Nor will a new trial be granted to admit newly-discovered evidence to points of which the party was before apprised, and had not shaped his pleas to admit it;<sup>4</sup> nor on account of the want of recollection of a fact, which, by due attention, might have been remembered; want of recollection being easy to be pretended, and hard to be disproved.<sup>5</sup>

Where the plaintiff had refused to produce a letter at the time, thinking the defendant had put in a sham plea, the court refused to grant a new trial, because it appeared that the evidence might have been produced had it not been for his own default.<sup>6</sup> Nor will the court grant a new trial on the ground of a claim which the party might have brought forward on the trial, but did not.<sup>7</sup>

(3.) *It must be material in its object, and not merely cumulative and corroborative, or collateral.*<sup>8</sup>

Cumulative evidence is such as goes to support the facts princi-

Fey v. Ryan, 3 Phila. Rep. 406; Knox v. Work, C. P., 2 Binn. 582; s. c., more fully reported, 1 Browne 101; Aubell v. Ealer, C. P., 2 Binn. 582, in note; s. c., 1 Browne 105, in note; Turnbull v. O'Hara, 4 Yeates 446; Waln v. Wilkins, Ibid. 461; State v. Harding, 5 Bay 267; Commonwealth v. Drew, 4 Mass. 399; Leshner v. State, 11 Conn. 415; Commonwealth v. Williams, 2 Ashmead 69; Cook v. Berry, 1 Wils. 98; Stanford v. Cullihan, 3 Mart. N. S. 124; Findley v. Nancy, 3 Monr. R. 403; Findley v. Commonwealth, 2 Bibb 18; People v. Vermilyea, 7 Cowen 369; Gordon v. Harvey, 4 Call 450; Palmer v. Mulligan, 3 Caines 307; Wilbor v. McGullicuddy, 3 Lo. R. 383; Rawle v. Skipurtt, 8 Mast. N. S. 593; Dixon v. Graham, 5 Dow 267; Coe v. Givan, 1 Blackf. 367; William v. Baldwin, 18 Johns. 489; Sheppard v. Sheppard, 5 Halst. 250; Deacon v. Allen, 1 South. 338; Litcomb v. Potter, 2 Fairf. 218; Vandervoort v. Smith, 2 Caines's R. 155; Den v. Geiger, 4 Halst. 225; Leshner v. State, 11 Conn. 15; Drayton v. Thompson, 1 Bay 263; State v. Gordon, Ibid. 491; Hollingsworth v. Napier, 3 Caines 182; Trumbull v. O'Hara, 4 Halst. 446; Waln v. Wilkins, Ibid. 461; Howe v. Work, 2 Binn. 582; s. c., 1 Browne 101; Aubell v. Ealer, 2 Ibid. 582 n.; Hawley v. Blanton, 1 Miss. 49; Hope v. Atkins, 1 Price 143;

Anonymous, 6 Mod. 222; Watson v. Sutton, 12 Ibid. 583; 1 Salk. 273.

<sup>1</sup> Jackson v. Malin, 15 Johns. 293; Gordon v. Harvey, 4 Call 450.

<sup>2</sup> Kelly v. Holdship, 1 Browne 36, Lister v. Goode, 2 Murph. 37.

<sup>3</sup> Fiss v. Smith, 1 Browne App. 71; Gorgerrat v. McCarty, 1 Yeates 253. See *post*, 608.

<sup>4</sup> Eccles v. Shackelford, 1 Litt. 35.

<sup>5</sup> Bond v. Cutler, 7 Mass. 205; Durgan v. Wyatt, 3 Blackf. 385.

<sup>6</sup> Cooke v. Berry, 1 Wils. 98. In another case, in an action upon a policy, the verdict was given for plaintiff, and the defendants moved for a new trial, assigning, as the reason why the evidence had not been offered at the trial, a presumption that the jury, of their own knowledge, must have taken notice of the fact. This was held an insufficient reason, and a new trial was refused: Gist v. Mason *et al.*, 1 T. R. 84.

<sup>7</sup> McDermott v. U. S. Ins. Co., 3 S. & R. 604.

<sup>8</sup> Moore v. Phila. Bank, 5 S. & R. 41; Commonwealth v. Flannagan, 7 W. & S. 415; Gardner v. Mitchell, 6 Pick. 114; Yarmouth v. Dennis, Ibid. 116, n.; Sawyer v. Merrill, 10 Pick. 16; Chambers v. Chambers, 2 A. K. Marsh. 348; Ames v. Howard, 1 Sumner 482; Alsop v. Ins. Co., Ibid. 451; Bullock v. Beach, 3 Verm. 72; Den v. Geiger, 4 Halst. 228; Pike v. Evans, 15 Johns.

pally controverted on the former trial, and respecting which, the party asking for a new trial, as well as the adverse party, produced testimony.

Where the object is to discredit a witness on the opposite side, the general rule is that a new trial will not be granted.<sup>1</sup> Thus, where the defendant was convicted of forgery, chiefly on the evidence of B. R., and on a motion for a new trial, evidence was produced to show the bias of B. R., it was held, by the Supreme Court of Massachusetts, that such evidence was no ground for the motion.<sup>2</sup>

Where a witness, whose testimony was not unexpected, was discredited by the party against whom he was produced, a new trial will not be granted, on the ground that the party has since discovered further evidence of his want of credit;<sup>3</sup> nor will a new trial be granted for newly-discovered evidence which goes only to discredit a witness sworn on the trial, and might have been proved by other witnesses who were sworn.<sup>4</sup>

It has, however, been decided, that where a witness on whose testimony a verdict was found, denied, on the *voir dire*, having an interest in the case, newly-discovered evidence that he was interested, was admissible on an application for a new trial; and it being proved, by similar evidence of declarations of the witness and of the prevailing party, that the witness's evidence was untrue, that a new trial should be granted.<sup>5</sup>

(4.) *It must be such as ought to produce, on another trial, an opposite result on the merits.*<sup>6</sup>

"After the verdict," said Rogers, J., on a motion for a new trial, "when the motion for a new trial is considered, the court must judge not only of the competency, but of the effect of evidence. If, with the newly-discovered evidence before them, the jury ought not to come to the same conclusion, then a new trial may be granted;<sup>7</sup> otherwise, they are bound to refuse the application. And in *Ludlow v. Parke*,<sup>8</sup> it is ruled that, in considering the motion, the court will not inquire whether, taking the newly-discovered testimony in connection with that exhibited on the trial, a jury might be induced to give a different verdict, but whether the legitimate effect of such

210; *Steinback v. Ins. Co.*, 2 Caines 129; *Smith v. Brush*, 8 Johns. 84; *Whiteback v. Whiteback*, 9 Cow. 266; *Reed v. Grew*, 5 Ham. 375; *Wheelwright v. Beers*, 2 Hall 391; *Guyot v. Butts*, 4 Wend. 579; *People v. Superior Court of New York*, 10 Wend. 285; *Com. v. Williams*, 2 Ashm. 69; *Moore v. Phila. Bank*, 5 S. & R. 41.

<sup>1</sup> *People v. Sup. Court of N. Y.*, 10 Wend. 292; *Shumme v. Fowler*, 4 John. R. 425; *Duryee v. Dennison*, 5 Ibid. 248; *Rowley v. Kinney*, 14 Ibid. 186; *Turner v. Pearle*, 1 T. R. 717; *Hammond v. Wadhams*, 5 Mass. 353; *Commonwealth v. Green*, 17 Ibid. 515; *Withers v. Ralston*, 3 Phila. Rep. 412.

<sup>2</sup> *Commonwealth v. Waite*, 5 Mass. 261.

<sup>3</sup> *Hammond v. Wadhams*, Ibid. 353.

<sup>4</sup> *Dodge v. Kendall*, 4 Verm. 31.

<sup>5</sup> *Chatfield v. Lathrop*, 6 Pick. 417.

<sup>6</sup> *Moore v. Phila. Bank*, 5 S. & R. 41; *Ewing v. McConnell*, 1 A. K. Marsh. 188; *Ludlow v. Parke*, 4 Ham. 5; *Sheppard v. Sheppard*, 5 Halst. 250; *Kendrick v. Delafield*, 2 Caines 67; *Halley v. Watson*, 1 Caines 24; *Commonwealth v. Manson et al.*, 2 Ashm. 31; *State v. Greenwood*, 1 Hay. 141; *Earl v. Sharldee*, 6 Ham. 409; *Jessup v. Cook*, 1 Halst. 434.

<sup>7</sup> *Wolfinger v. Fenton*, 2 Phila. 19.

<sup>8</sup> 4 Ham. Ohio R. 5.

evidence would require a different verdict. The question, therefore, is (supposing all the testimony, new and old, before another jury), not whether they might, but whether they ought to give another verdict. It is manifest, therefore, if these principles be correct, granting a new trial would be almost, if not quite, equivalent to a verdict of acquittal."<sup>1</sup>

#### 8. *Absence.*

The sudden illness of counsel, as well as the sudden illness of a witness, would be a good reason for a new trial.<sup>2</sup> Where the defendant was out of the Commonwealth, his witnesses absent, and his attorney prevented, by sudden indisposition, from being present, it was held that a new trial should be granted.<sup>3</sup>

A new trial was refused, where a verdict had passed for the plaintiff, on the evidence of one witness; and the defendant being absent from home at the time of the trial, was unprepared to meet it.<sup>4</sup>

It is a general rule, that neither the mistake nor the absence of counsel, if voluntary or accidental, is a ground for a new trial.<sup>5</sup> Where the defendant's attorney had conversed with the partner of the plaintiff's attorney, whom he supposed to be also attorney for the plaintiff, and was misled by him as to the time when the case would be called on, a new trial was ordered, on payment of all the costs by the defendant.<sup>6</sup>

It is no ground, however, for a new trial, that the defendant did not know on what day of the term his case would be tried; nor that the defendant's attorney was absent when the case went to the jury, and the plaintiff's counsel agreed before the recording of the verdict to open the case.<sup>7</sup> No mere engagement of a business character will be received as an excuse for the non-appearance of counsel. Thus, where the counsel for the defendant made oath, that in his capacity as counsel for the Humane Society of New York, he was obliged to visit the jail on the very day that the trial took place, and offered to pay all costs, a new trial was refused.<sup>8</sup> Absence of counsel, to be a good ground, must be on an engagement in another court. A new trial was consequently refused where counsel was telegraphed for to Harrisburg from Philadelphia, "on professional business," and had communicated the fact (though not the cause) to the judge.<sup>9</sup>

Motions were refused in the District Court of Philadelphia, where the attorney of one party was, by an accidental interchange of cases, misled as to the position of his cause and was thus absent;<sup>10</sup> where

<sup>1</sup> Commonwealth v. Flanagan, 7 W. & S. 423.

<sup>2</sup> Fiss v. Smith's Ex'rs., *ut supra*.

<sup>3</sup> Honone v. Murray, 3 Dana 31. See 2 Ibid. 334; 4 Litt. 1.

<sup>4</sup> Leedom v. Pancake, 4 Yeates 183.

<sup>5</sup> Fiss v. Smith's Ex'rs., 1 Browne Appx. LXXI.; Gorgerrat v. McCarty, 1 Yeates 253.

<sup>6</sup> Sayer v. Finck, 2 Caines 336.

<sup>7</sup> Allen v. Donnelly, 1 McCord 113; Greatwood v. Sims, 2 Chitty 269.

<sup>8</sup> Post v. Wright, 1 Caines 111.

<sup>9</sup> Olden v. Litzburg, 1 Phila. 204.

<sup>10</sup> Vandegrift v. Malcomson. Motion to take off nonsuit. *Per curiam*. With every disposition to assist counsel, where a mistake has occurred, by which a nonsuit has been entered, we cannot do so in this case. It might present a different case, were it shown to us that the claim is now barred by the Statute of Limitations. That, however, is not the case, and the only matter is one



the plaintiff took a verdict in the absence of the defendant and his attorney, who were out of court, endeavoring to obtain the Christian name of a material witness in the case, when the case was called;<sup>1</sup> where the defendant's counsel was absent at the time of the trial of a case, relying on the promise of his adversary to notify him;<sup>2</sup> where the defendant, his attorney, and witnesses were absent at the time of the verdict, in consequence of an erroneous impression that the case was continued;<sup>3</sup> and where the verdict was taken when the defendant and his witnesses went, by mistake, into the wrong court-room, while his counsel was absent in another court, under the promise of plaintiff's counsel to send for him when the case was called.<sup>4</sup> Nor is it a good reason that the verdict was taken during

merely of costs. We think it best to adhere strictly to rule. The counsel left the court while the first case was on trial. He left no one in charge of the case; no memorandum of where he was going. It was said, he went to his office. When he returned, No. 10 was on trial; when concluded, he was told that No. 11 had been nonsuited. All this was true. No. 10 had been reached and passed, on account of the engagement of counsel, or some other cause; No. 11 was called, no one answered for plaintiff; plaintiff's counsel was sent for in the other courts, without success; and a nonsuit was entered. And then the counsel in No. 10 having come in, or other reason for its having been passed removed, the judge returned to No. 10. It is a lesson which, perhaps, it may require some time and experience thoroughly to teach, that counsel cannot safely leave the court, for any space of time, or for any purpose, without taking the precaution to leave their cases in care of somebody. Motion dismissed.

<sup>1</sup> *Field v. Sergeant*, D. C. C. P., 7 Leg. Int. 110; 1 Phila. Rep. 72, s. c.

<sup>2</sup> *Tams v. Graef*, D. C. C. P., 7 Leg. Int. 98; 1 Phila. Rep. 70, s. c.

<sup>3</sup> *Duffy v. McGelligan*, D. C., Saturday, June 15th 1850. Motion for a rule for a new trial. *Per curiam*. The reason assigned for a new trial is, that the case was called up and tried by plaintiff's attorney, in the absence of the defendant's attorney, defendant, and his witnesses, after the plaintiff's attorney had requested defendant's attorney to have the cause continued, on account of the inability of plaintiff's attorney to try, and the case had been accordingly so continued. The fact appears by the record to be, that when the case was called, it was left open on account of the engagement of plaintiff's attor-

ney, and never was continued. Such is the well-established practice of the court, nor would a case be continued on account of the engagement of counsel, without the payment of the continuance fee, unless it appeared highly probable that the engagement would continue for the whole period assigned for the trial of the case. It is clear, therefore, that defendant's attorney acted under a mistake in dismissing his client and witnesses. It would be dangerous to give effect to such a ground for a new trial. In cases of this character, the counsel must necessarily be thrown upon the courtesy of his opponent. Rule refused.

*Rambo v. Chambers*, Saturday, March 20th 1852. Motion to take off nonsuit. *Per curiam*. This is a case in which, however disposed to relieve parties who have lost a trial, we do not feel at liberty to interfere when the defendant objects. No depositions have been taken, and we have been compelled to rely on the statements of counsel at the bar. A gentleman who leaves the court-room on an errand of business, ought to take the precaution to mention where he is going. Here, indeed, the plaintiff's attorney took that precaution, but the nonsuit occurred from the ignorance or mistake of his client. The defendant and his counsel were in no default, and their statement does not, in all respects, accord with that of the plaintiff. Motion dismissed.

<sup>4</sup> *Woodward v. Hindley*, D. C., Saturday, June 15th 1850. Motion for a rule for a new trial. *Per curiam*. The allegation is, that the defendant went, by mistake, to the wrong court-room, with his witnesses, and that his counsel, being engaged in the Criminal Court, depended upon the promise of plaintiff's counsel to send for him in

the temporary absence of counsel, waiting for a cause in another court.<sup>1</sup>

#### 9. *Want of notice.*

Where the party or his counsel have had no notice of the trial, or such notice has been imperfect, or had a tendency to mislead, or been insufficient for their information, a new trial should be granted;<sup>2</sup> but where the party has gone astray from his own negligence, or appeared and taken defence without notice, the practice is otherwise.<sup>3</sup>

Where in a feigned issue on a sheriff's levy, the case was put down on the trial-list under the name of the original execution and not of the issue, with the word *ex.* and the name of counsel subjoined, and the verdict was entered on the trial for defendant, the plaintiff not appearing, it was held no ground for a new trial;<sup>4</sup> and so where the defendant's name was misspelled on the trial-list;<sup>5</sup> and where, the defendant having made an assignment, his assignee received the notice of trial, but did not forward it to the defendant.<sup>6</sup> But where the cause was put on the trial-list without an order, without the plaintiff's knowledge, the court took off a nonsuit.<sup>7</sup>

#### 10. *Mistake.*

Where the cause has been prejudiced, from some misconception of the judge, or mistake of the party or his counsel, which could not have been avoided by ordinary prudence and care, a new trial will be allowed. Thus, where the counsel were misled by a positive intimation from the court, and refrained from offering evidence;<sup>8</sup>

the event of the case being called. Neither reason is of any avail, and both together make the case no stronger. If we aim at regularity, certainty, and dispatch in the trial of causes, we must have rigid rules, and rigidly adhere to them. Rule refused.

<sup>1</sup> *Dickson v. Elson*, Dec. 23d 1848. Motion for a rule for a new trial. *Per curiam*. We should be glad to help the plaintiff in this case, but it would be a precedent too dangerous to establish, that a counsel waiting for a cause in another court, should be deemed a sufficient apology for not answering for the cause here. The proper mode of avoiding all difficulty, is to let his client, or some one else, answer to the case, and then send for him. Motion dismissed.

<sup>2</sup> *Bingley v. Mollison*, 3 Doug. 402; *Watson v. Gowen*, 8 D. & Ryl. 456; *Attorney-General v. Stevens et al.*, 3 Price 72; *Yate v. Swaine*, Barnes 233; *Lisher v. Parmelee et al.*, 1 Wend. 22.

<sup>3</sup> *Wolfe v. Horton*, 3 Caines 86; *Bander v. Covill*, 4 Cowen 60; *Doe v. Kighley*, 7 Term 1359.

<sup>4</sup> *Lincoln v. Parmentier*, D. C. C. P., 7 Leg. Int. 15; 1 Phila. Rep. 26, s. c.

<sup>5</sup> *Ivins v. Huber*, March 15th 1851. Motion for new trial. *Per curiam*. The defendant's name was misspelled on the trial-list. The plaintiff's name and both the counsel were printed correctly. Were we to listen to such reasons as grounds for a new trial, there is no case in which a new trial might not be had—when the party had neglected to attend to his case. Rule refused.

<sup>6</sup> *Mussi v. Lorain*, 2 Browne 99.

<sup>7</sup> *Myers v. Riot*, D. C., Saturday, March 18th 1848. Motion to take off nonsuit. *Per curiam*. The plaintiff, it appears by the affidavit, was led astray by the refusal of the clerk to put the cause on the trial-list for the third period of September Term. The clerk was right, for the order was not given until after the *venire* had issued. It went down for the succeeding term without an order, and of this the plaintiff was ignorant. Nonsuit taken off.

<sup>8</sup> *Le Flemming v. Simpson*, 1 M. & Ryl. 269; *Durham v. Baxter*, 4 Mass. Rep. 79; though see *Beekman v. Reemins*, 7 Cowen 29; *Jackson v. Cody*, 9 Ibid. 140.

and where the judge misapprehended a material fact, and misdirected the jury;<sup>1</sup> a new trial has been granted.<sup>2</sup>

A verdict, in a penal action, however, will not be set aside where given for the defendant, unless it has been procured by mistake of the judge.<sup>3</sup>

A new trial will be granted where it appears that there was such a mistake in the bill of particulars as to mislead the defendant.<sup>4</sup>

A new trial was granted for a mistake by the jury, in the value of foreign money.<sup>5</sup>

The court will not grant a new trial on the ground of a claim, which the party might have brought forward at the trial, but did not.<sup>6</sup>

Although relief will be granted when an innocent mistake of counsel is made, this will not be the case when it appears that the same result would have taken place from a want of evidence on the merits.<sup>7</sup>

### 11. *Surprise.*

Where a party, or his counsel, has been taken by surprise, in the course of a cause, by some accidental circumstance, which could not have been foreseen, and in which no *laches* could be ascribed to either of them, a new trial will be awarded,<sup>8</sup> particularly if the court think the verdict against the weight of evidence.<sup>9</sup> Thus, a new trial has been granted where the plaintiff is surprised by the testimony of two witnesses who appeared to have been tampered with;<sup>10</sup> where a witness has been so much disconcerted as to be unable to testify at the trial;<sup>11</sup> where the jury gave a verdict against the plaintiff's claim, on a bill endorsed without the words, "or order," apprehending that, by the usage of merchants, it was not assignable, which usage the plaintiff did not expect to have to prove;<sup>12</sup> and where a material witness, regularly *subpœnaed* and in

<sup>1</sup> *Jackson v. Harth*, 1 Bailey 482; *Jones v. McNeill*, *Ibid.* 235; *Murden v. Insurance Co.*, 1 Rep. Con. Ct. 200.

<sup>2</sup> *Handley v. Harrison*, 3 Bibb 481.

<sup>3</sup> *Clay v. Sweet*, 4 *Ibid.* 255.

<sup>4</sup> *Pfeffer v. Martin*, D. Ct. C. C. P., July 1848.

<sup>5</sup> *Betts v. Death*, Add. 267.

<sup>6</sup> *McDermott v. United States Insurance Co.*, 3 S. & R. 604.

<sup>7</sup> *Gault v. Mitchell*, D. C., Saturday, June 10th 1848. Motion to take off nonsuit. *Per curiam*. We are disposed to be liberal in taking off a nonsuit where it has been a mere mistake of counsel. Here the nonsuit would be taken off on the surmise of the plaintiff's counsel, that he did not hear or understand the direction of the judge to call another witness, after he had declined stating what he proposed to prove by the witness then on the stand, if there were any evidence that there was any material witness actually in court whom he

could have called. But the truth is he had called over several names on his *subpœna*, and it was only upon being urged to proceed that he called John J. Taylor to the stand—and as to him, after having been asked once by defendant's counsel and twice by the judge—what he proposed to prove—either declined to answer or stated that he was endeavoring to ascertain. It is plain that the case failed from no fault of the counsel, but because it was not ready for trial. Motion refused.

<sup>8</sup> *Guthrie v. Bogart*, 1 A. K. Marsh. 334; *Blythe v. Sutherland*, 3 McCord 288; *Libenintz v. Greenland*, 2 *Ibid.* 315; *Comply v. Brown*, Const. Rep. 100.

<sup>9</sup> *Hughes v. McGee*, 1 A. K. Marsh. 28.

<sup>10</sup> *Peterson v. Barry*, 4 Binn. 481.

<sup>11</sup> *Ainsworth v. Sessions*, 1 Root 175.

<sup>12</sup> *Edie v. East India Company*, 1 Wm. Black. 295.

attendance, absented himself shortly before the case was called.<sup>1</sup> In case of a seduction, where the principal witness laid the seduction on a day which the defendant had no reason to anticipate, being at a time when he was absent from the place, and could easily prove an *alibi*, a new trial was granted.<sup>2</sup>

The mere fact of a party being surprised by the introduction of unexpected evidence, however, is no ground for a new trial;<sup>3</sup> nor can surprise be alleged as a sufficient reason, if the declaration and exhibits give notice.<sup>4</sup> Where a material witness for the government had declared that he would hang the prisoner by his testimony, if he could, which declaration the prisoner did not hear until after the trial, the court refused a new trial.<sup>5</sup> In general, as has been seen, the production of unexpected evidence, impeaching the character of a witness, is no reason to set aside the verdict.<sup>6</sup>

There are but few cases in which the verdict will be set aside, where neglect is ascribable to the party or his attorney, or if a good reason for a new trial on the merits is not shown.<sup>7</sup> There is an exception, however, which is sometimes made, where the case is strong on the merits, and has been lost, owing to the culpable negligence of the counsel employed. In such a case a new trial will be granted, accompanied by the condition that the counsel be compelled to pay the costs.<sup>8</sup>

Surprise cannot be set up as a reason for a new trial, where the cause was tried at a day of the term subsequent to that at which the party expected it to come on;<sup>9</sup> and if a party knowing a witness to be absent, hazards a trial, no new trial can be granted on account of alleged surprise arising from the absence of such witness;<sup>10</sup> nor is it good ground for a new trial, that the party failed to summon material witnesses at the trial, under advice of counsel that their attendance was unnecessary.<sup>11</sup>

Where the pleadings do not distinctly state the extent and character of the plaintiff's claim (as in a *scire facias* on a mechanic's

<sup>1</sup> *Ruggles v. Hall*, 14 Johns. 112.

<sup>2</sup> *Sargent v. —*, 5 Cowen 106. See *ante*, 607, as to what cases the defendant can be relieved in, on the ground of after-discovered evidence of the incompetency or bias of witnesses.

<sup>3</sup> *Willard v. Wetherbee*, 4 N. Hamp. 118; *Bell v. Howard*, 4 Litt. 117.

<sup>4</sup> *Harrison v. Wilson*, 2 A. K. Marsh. 547; *Dodge v. Kendall*, 4 Verm. 31; *Bitting v. Mowry*, 1 Miles 216; *Smith v. Morrison*, 3 A. K. Marsh. 81; see *ante*, 608-9.

<sup>5</sup> *Commonwealth v. Drew*, 4 Mass. 391.

<sup>6</sup> *Ball v. Howard*, 4 Litt. 117; *Den v. Geiger*, 4 Halst. 225; *Shummay v. Fowler*, 4 Johns. 425; *Commonwealth v. Green*, 17 Mass. 515; see *ante*, 607.

<sup>7</sup> *Commonwealth v. Benesh*, Thatcher's C. C. 684; *Patterson v. Mat-*

*thews*, 3 Bibb 80; *Barry v. Willbourne*, 2 Bailey 91; *Leedon v. Pancake*, 4 Yeates 183; *Hawley v. Blanton*, 1 Miss. 49; *McLane v. Harris*, *Ibid.* 700; *McLane v. Commonwealth*, 2 Bibb 17; *Smith v. Morrison*, 3 A. K. Marsh. 81; *Blackhurst v. Bremer*, 1 Dowl. & Ry. 553; *Blake v. How*, 1 Aik. 306; *Smith v. Morrison*, 3 A. K. Marsh. 81; *Jackson v. Roe*, 9 Johns. 77; *Cockerill v. Calhoun*, 1 Nott & McCord 285; *Steinbech v. Col. Insurance Co.*, 2 Caines 129; *Jackson v. Van Antwerp*, 8 Cowen 273.

<sup>8</sup> *Martyn v. Podger*, 5 Burr. 2631; *sed contra*, *De Rouffigny v. Peale*, 3 Taunt. 484.

<sup>9</sup> *Cotton v. Brashiers*, 2 A. K. Marsh. 153.

<sup>10</sup> *Gill v. Warren*, 1 J. J. Marsh. 590.

<sup>11</sup> *Pleasants v. Clements*, 2 Leigh 174.

claim), and upon the trial, the plaintiff opens his case upon a certain basis, which is successfully met by the defendant; and the plaintiff, in conclusion, relies upon a different case, arising out of the testimony, so as to produce a material surprise upon the defendant, and the jury find for the plaintiff, the court will grant a new trial.<sup>1</sup>

But the court will not grant a new trial, if the amount in controversy, arising out of such matter of surprise, is so small as not to exceed the costs to the parties of another trial.<sup>2</sup>

It is not a sufficient reason for a new trial, that the plaintiff's principal witness stated as a fact that which appeared afterwards to have been mere hearsay;<sup>3</sup> nor that an unsubpoenaed witness was absent from trial.<sup>4</sup>

Where the plaintiff, on the trial, was led to believe that to the plea of *non est factum*, an affidavit denying execution had been added, and being surprised, was unable to give proof of execution, and it turned out that no denial had been made of execution, the court granted a new trial.<sup>5</sup>

A new trial was granted where the plaintiff was surprised at the trial by an allegation of a payment, sworn to by two witnesses whom there was reason to suspect of perjury.<sup>6</sup>

Where the plaintiff having produced on trial an agreement by the defendant to settle and pay costs, of which the defendant's counsel denied all knowledge, and required proof, which the plaintiff was unable to produce, and was, consequently, nonsuited, the court refused to take off the nonsuit.<sup>7</sup> A new trial, on the ground of surprise, will not, in general, be granted to a plaintiff, unless his claim is barred by the statute, or the defendant is beyond the jurisdiction of the court, or is able, for some reason, to show that, if he had suffered a nonsuit, he would have irreparably lost the case, especially where the costs are unusually heavy.<sup>8</sup>

<sup>1</sup> *Bitting v. Mowry*, 1 Miles 216.

<sup>2</sup> *Ibid.*

<sup>3</sup> *McGee v. Kinsey*, 9 Leg. Int. 46, 1 Phila. Rep. 326.

<sup>4</sup> *Kelly v. Holdship*, 1 Browne 36. *Robinett et al. v. Lair*, D. C., December 23d 1848. Motion for a rule for a new trial. *Per curiam*. This motion is made because of the temporary absence of a witness, who was attending voluntarily without a subpoena. It is clear that a party under our system is never safe unless he has all witnesses under subpoena. Here no attachment would have been sent, and to have continued the cause on such ground would be to open the doors to an evasion of all the rules which have been made for the purpose of enforcing the trial of a cause, and of obviating, to some extent at least, the vexatious delays in the administration of justice, of which so much just complaint has been made. Rule refused.

<sup>5</sup> *Commonwealth v. Farrell*, D. Ct. C.

C. P., Ap. 1847.

<sup>6</sup> *Peterson v. Barry*, 4 Binn. 481.

<sup>7</sup> *Milke v. Karlbaum*, D. C., Saturday, March 18th 1848. Motion to take off nonsuit. *Per curiam*. We would be glad to help the plaintiff in this case, but we cannot do so. On the trial, he produced an agreement by the defendant to settle and pay the costs. He had no proof of the agreement; defendant's counsel denied all knowledge of his client's signature; the plaintiff had no evidence to prove his case, and of course was nonsuited. He ought to have been ready at all events to have proved the settlement. It is absolutely necessary to enforce upon parties and their counsel active vigilance in preparation for and attention to their cases on the list. The rights of other suitors as well as their own are involved. Motion refused.

<sup>8</sup> *Martin v. Marvine*, D. C. Phila., 9 Leg. Int. 2; 1 Phila. Rep. 280, s. c. See *ante*, 593.

### 12. *Irregularity in impannelling the jury.*

Generally speaking, the mistake or informality of the officers charged with summoning, returning, and impannelling the jury, will be no ground for a new trial, unless there has been fraud or collusion, or material injury to the defendant.<sup>1</sup>

By the Act of 21st February 1814, no verdict can be set aside, nor shall any judgment be arrested for any defect or error in the jury process, "but a trial, or an agreement to try on the merits, or pleading guilty, or the general issue, shall be a waiver of all errors and defects in, or relative and appertaining to the said precept, *venire*, drawing, and summoning of jurors."

### 13. *Unsuitable damages.*

Except in an overwhelming case of excessive damages, a court is not at liberty to give the losing party, in an action for personal injury, a second chance.<sup>2</sup> Though a jury give liberal damages in *assumpsit*, yet if they are not outrageous, the court will not order a new trial.<sup>3</sup> The court will not grant a new trial, because the jury have exceeded legal interest in the measure of damages, for delaying payment of money, unless it be excessive.<sup>4</sup> While the courts possess the power to grant new trials for excessive damages in cases of *torts*, there is no precedent of a new trial for this reason in *crim. con.*<sup>5</sup> And the case must be a rank one to induce the court to set aside a verdict, in an action for a *tort*, on account of the excessiveness of the damages.<sup>6</sup>

It is not correct to say, that a new trial will never be granted where the jury find only nominal damages.<sup>7</sup> Where a plaintiff is entitled only to nominal damages, the court will not grant a new trial when the verdict is for defendant.<sup>8</sup> Where a jury, in a very hard action, disregard an instruction that plaintiff is entitled to nominal damages only, it is not sufficient ground for a new trial.<sup>9</sup>

Where, in trespass for taking the plaintiff's goods, of the value of only \$40, \$5000 damages were given, and no affront had been offered, by battery or menaces, to the plaintiff's person, a new trial was granted;<sup>10</sup> and so where, in an action against the sheriff, for levying an execution (which it was contended was satisfied) on the plaintiff's property, the jury gave \$950 damages, and there was no evidence of a design to oppress, but the conduct of the officer was mild and moderate, a new trial was granted, on the terms of the verdict standing as a security, and the action not to abate.<sup>11</sup>

<sup>1</sup> *R. v. Hunt*, 4 Barn. & Ald. 430; *Commonwealth v. Chauncey*, 2 Ashm. 90; *Amherst v. Hadley*, 1 Pick. 38; *Cole v. Perry*, 6 Cowen 584; *People v. Ransom*, 7 Wend. 417; *Dewar v. Spence*, 2 Wh. 211; *Commonwealth v. Gallagher*, 4 P. L. J. 58.

<sup>2</sup> *Kenderdine v. Phelin*, S. C. N. P., 9 Leg. Int. 54; 1 Phila. Rep. 343, s. c.

<sup>3</sup> *Roberts v. Swift*, 1 Yeates 209.

<sup>4</sup> *Republica v. Lacaze*, 2 Dallas 118; s. c., 1 Yeates 15.

<sup>5</sup> *Shoemaker v. Livezey*, 2 Browne 286.

<sup>6</sup> *Summer v. Wilt*, 4 S. & R. 27; *Kuhn v. North*, 10 Ibid. 409; *McIntire v. Stringer*, 3 Phila. Rep. 302.

<sup>7</sup> *Shenk v. Mundorf*, 2 Browne 106.

<sup>8</sup> *Todd v. Jones*, D. C. C. P., 7 Leg. Int. 42; 1 Phila. Rep. 45, s. c.

<sup>9</sup> *Mishler v. Baumgardner* (C. P. Lancaster, per Lewis, P. J.), 8 P. L. J. 304.

<sup>10</sup> *Shoemaker v. Livezey*, 2 Browne 286; *Ibid.*

<sup>11</sup> *Kuhn v. North*, 10 S. & R. 393.

In contracts, which can be enforced specifically, or where damages are to be given for their non-performance, there is always a measure of damages. In actions affecting the reputation, the person, or the liberty of a man, they must depend, in some measure, on the discretion of the jury. If the jury go beyond the standard, the value ascertained by the evidence of the thing contracted for, or under its value, the court will set aside the verdict; but in the vindictive class of actions, the damages must be outrageous to justify the interference of the court; seldom, if ever, for smallness of damages. There is a great difference between damages which can be ascertained, as in *assumpsit*, trover, &c., where there is a measure, and personal torts, as false imprisonment, slander, malicious prosecution, where damages are matter of opinion.<sup>1</sup> To be forced to submit to a wrong, or incur the trouble and expense of a lawsuit, is always a damage to be estimated by the jury.<sup>2</sup>

The court has power to compel a release of a portion of the damages, or to grant a new trial. Conditions precedent must always be performed before a right dependent thereon can be enjoyed, and if no time be fixed, and performance be wholly in the will of the grantee, the law gives a reasonable time within which to perform it. A party asking deliverance, at the discretion of the court, from an adverse verdict, must be prompt in the performance of every condition imposed.<sup>3</sup> Where a new trial was granted on motion of the plaintiff, on conditions precedent, and the plaintiff failed to comply with the conditions for eight or nine years: held, that the delay was unreasonable, and the right to a new trial was lost.<sup>4</sup>

#### 14. *Time and form of motion.*

By a former rule of the Supreme Court, all motions in arrest of judgment, or for a new trial, in causes tried at Nisi Prius, were required to be made within the first four days of the next succeeding term; but no such motion could be received or admitted, unless notice in writing of such intended motion had been first given to the adverse party, or his attorney, ten days at least before the term commenced;<sup>5</sup> though, when a point is reserved at the trial, this notice was dispensed with.<sup>6</sup> "The counsel who makes a motion for a new trial, or in arrest of judgment, is required, before the commencement of the argument, to file in the prothonotary's office, and also to deliver to each of the judges, a written specification of the points on which he means to rely in support of his motion."<sup>7</sup>

As will hereafter be more fully seen, in motions and rules for new trials, the party who obtains the same must furnish to each of the judges a copy of the reasons filed. Every motion for a rule for a new trial must be placed on the motion-list, and one counsel only is heard in support of the motion. If the rule shall be granted,

<sup>1</sup> Per DUNCAN, J., 17 S. & R. 50.

<sup>2</sup> D. C. Bedford v. McWilliams, 3 Phila. Rep. 137.

<sup>3</sup> Ward v. Patterson, 10 Wright 372.

<sup>4</sup> Ibid.

<sup>5</sup> Foxcraft v. Nagle, 2 Dallas 150;

s. c., Galloway v. Negle, 1 Yeates 103; s. p., Furry v. Stone, Ibid. 186; Henry v. Kennedy, 1 Binn. 458; Britton v. Stanley, 1 Wh. 267.

<sup>6</sup> Reinouldt v. Aublai, 4 Binn. 378.

<sup>7</sup> Rules of Court, 6 S. & R. 600.

the party who is to show cause against the rule is first heard by one counsel only in reply. But the court will order a further argument by other counsel, in cases which, in their opinion, require it.

The motion is, for a rule to show cause why a new trial should not be granted. The established practice is to place the motion for a new trial on what is denominated the motion list, upon which are entered motions, for example, to discharge on common bail; why judgments should not be opened; why appeals from awards should not be struck off; for rules to take money out of court; together with such others as the course of practice may give rise to. This list is usually taken up towards the end of each period of the term; or, as in the District Court and Common Pleas, every Saturday during the periods of jury trials. The causes rank by the date of the motions; not by their terms and numbers. Until the list has been gone through, the argument-list is not made out completely, as the clerk must be governed by the manner in which the motions are decided, in placing the causes upon it. If the court decline granting the rule (after hearing the applicant only), the motion is marked dismissed, or refused. If granted, it is immediately transferred to the argument-list, according to its term and number, and argued during that portion of the term allotted by the court for the discussion and decision of questions of law. The time set apart for arguments is always indicated in the printed regulations for the conduct of the business of each succeeding term. By the Act of 1835, § 8, reorganizing the District Court, "motions for new trials and in arrest of judgment, and questions on reserved points, which may be made and sustained before any one of the judges of the said court, shall be reserved by the said judges, and heard and decided by the three judges of the said court, or any two of them sitting together for that purpose."<sup>1</sup>

In the Supreme Court, the day upon which a verdict is given is to be computed as one of the four days within which a motion for a new trial must be made.<sup>2</sup> It has been held otherwise in the District Court, and that if Sunday intervene it is *dies non juridicus*, and not included in the four days.<sup>3</sup> And so in the Common Pleas, by an express rule. In the latter court, the rules in relation to new trials, are as follows: "Motions for new trials shall be made within four days after the verdict; and unless such motion shall be made, and a rule to show cause granted by the court within that time, judgment shall be entered absolute. The day on which the verdict is given, and Sunday, are to be excluded in calculating the four days."

"On a motion for a new trial, the court will determine on the showing of the party by whom it is made, whether to grant a rule to show cause or not, without hearing the opposite party. If a rule be granted, the cause will be set down for argument; if not, judgment will be entered on the verdict, unless stayed by motion in arrest of judgment."

<sup>1</sup> Pamph. L. 91, Purd. Dig. 333.

<sup>2</sup> Lane v. Shreiner, 1 Binu. 292.

<sup>3</sup> Golder v. Blackstone, December 1820, MS. Wh. Dig. "New Trials."



"When, in the course of a trial, a bill of exceptions shall have been taken to the opinion of the court, either in their charge, or the admission or rejection of testimony, the court, in their discretion, may permit a motion for a new trial to be made and argued upon the same grounds as those on which the bill of exceptions shall have been taken. This, however, is entirely discretionary, and, in general, will not be allowed, unless the court desire a further argument, or wish further time to deliberate on the subject."

It is a general rule that a motion for a new trial shall not be made after a motion in arrest of judgment.<sup>1</sup>

The decision of an inferior court, on a motion for a new trial, is not the subject of a writ of error.<sup>2</sup>

In the District Court, all motions for new trials, and reasons in arrest of judgment, must be made within four days after the verdict, notwithstanding points have been reserved; and whenever a nonsuit is ordered with leave to move to take it off, a motion to take the nonsuit off must be made within the four days. No motion for a new trial can be made after a motion in arrest of judgment.<sup>3</sup>

Unless good ground of surprise, or the like, is laid the court will refuse to allow a motion for a new trial to be entered *nunc pro tunc*, when the four days have been let pass without entering the motion.<sup>4</sup>

The reasons filed must specially set forth the grounds on which the application rests.<sup>5</sup>

<sup>1</sup> Rules S. Ct., Walker's Rules 111; 2 Salk. 647; 1 Burr. 334; Bull. N. P. 326.

<sup>2</sup> *Burd v. Lessee of Dansdale*, 2 Binn. 90, Wh. Dig. "Error."

<sup>3</sup> Walker's Rules 23.

<sup>4</sup> *Wetherill v. Woodruff*, D. C., December 23d 1848. Why a motion for a rule for a new trial shall not be entered *nunc pro tunc*. *Per curiam*. We must adhere to the old and well-established rules of the court, unless the circumstances of the particular case address themselves to our legal discretion. Though the depositions might show some ground for the absence of both the counsel when the cause was tried, yet no reason, whatever, is assigned for not having made the motion for a new trial within the four days. The fact of the trial having taken place, was known to one of the counsel on the same day, and to the other on the day after. Rule discharged.

*Smith v. Fauner*. Why a rule for a new trial should not be entered *nunc pro tunc*. *Per curiam*. The rule, that a new trial must be moved for within four days, is an invaluable one; but to say that it may be dispensed with in every case of forgetfulness or inatten-

tion, would be, practically, to repeal it. No doubt the court can order a new trial after four days, where they see that injustice has been done. Here, however, no reasons for a new trial have been shown which we think require the unusual interposition of the court. Rule discharged.

<sup>5</sup> *Sweeney v. Hamblin*, D. C., March 16th 1850. Motion for a new trial. *Per curiam*. This case, not being answered to on the third calling of the list, was marked submitted. Of course, in such case, we have no guide but the report of the judge before whom the cause was tried, and the reasons. It is especially important, therefore, under the present practice, that the reasons filed should be special, and explain the grounds meant to be presented. In the case before us, the judge reports that it was an action of *assumpsit*, and involved a matter of account between the plaintiff and defendant, which was submitted to the jury without any charge; and he sees no reason to be dissatisfied with the result. The reasons filed are: 1. The verdict of the jury was contrary to the weight of the evidence; 2. The jury erred in their calculation of the accounts between the

15. *Terms and costs.*

The court may impose a condition on the defendant on granting a new trial, to try the cause on its merits, without objecting to the form of the action, or to the declaration;<sup>1</sup> or may order the verdict to remain as security for the damages which may be found on another trial; and the action (if in tort) not to abate by the death of any party, or as to any party.<sup>2</sup> So they may grant a new trial upon the terms that the defendant shall pay all the costs which have accrued up to the time of trial, and may enforce that rule by entering judgment upon the verdict against the non-complying party.<sup>3</sup> But if the other party acquiesce in their non-payment, or proceed to enforce payment by citation and attachment, he cannot afterwards have judgment by default of payment of such costs.<sup>4</sup>

Where, in an action for money had and received, brought by one partner against another, before a balance had been struck, a trial had been had on the merits, and a motion for a new trial was made, on the ground that the plaintiff could not recover in *indebitatus assumpsit*, the court granted a new trial, on condition that the defendant consented that the form of action should be changed to *account render*, and that the costs of the former action should abide the event of the cause;<sup>5</sup> and so, where an error occurred on the trial, as to the value of foreign money, and also in the amount of interest, the court decided that the plaintiff might correct the errors; but if he refused to do so, they awarded a new trial, on condition that the defendant should confine himself to those points in which the mistake occurred.<sup>6</sup> As has just been seen, where a new trial is granted upon the terms of the payment of costs, the court, after a rule granted for the purpose, may render judgment on the verdict, if the party applying for the new trial fail to pay the costs; but such rule and judgment must be the act of the court, and cannot be entered in vacation;<sup>7</sup> and if a plaintiff, after a new trial granted upon such terms, enters a rule for a commission to take the testimony of witnesses, he will be considered as waiving the right of making the payment of costs a condition precedent to a new trial.<sup>8</sup>

As to costs on granting a new trial, the Act of the 21st March 1806, § 3,<sup>9</sup> has made some variation from what the law was in this State before.<sup>10</sup> It provides that, "in all cases where a verdict of a jury shall be set aside, a new trial shall be had on the same condi-

plaintiff and defendant; 3. That the accounts in the books submitted to the jury were miscalculated, and, therefore, the jury were misled. These reasons afford no clue to enable us to understand the defendant's objections. We take this occasion, once again, to give a caution to gentlemen of the bar, as we have done before on this subject. It may happen to the most careful and attentive practitioner, to be absent on the third calling, and have his case marked submitted. If his reasons are specially set forth, his chance of suc-

cess, in such case, on having his rule at least granted, is considerably increased. Rule refused.

<sup>1</sup> *Welsh v. Duser*, 3 Binn. 337; *Walker v. Long*, 2 Browne 135.

<sup>2</sup> *Kuhn v. North*, 10 S. & R. 411.

<sup>3</sup> *Devinney v. Reeder*, 1 Pa. R. 399.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Walker v. Long*, 2 Browne 135.

<sup>6</sup> *Lee v. Wilcocks*, 5 S. & R. 48.

<sup>7</sup> *Devinney v. Reeder*, 1 Pa. R. 399.

<sup>8</sup> *Ibid.*

<sup>9</sup> 4 Sm. Laws 326; *Purd. Dig.* 52.809.

<sup>10</sup> *Work v. Maclay*, 14 S. & R. 265.

tions, as to costs and daily pay, as are prescribed by that Act in cases of a new trial, on the report of referees being set aside;" that is, if the plaintiff obtain a new trial, and do not recover a sum equal, or greater, than was first given, he shall not have judgment for costs, and shall pay the defendant seventy-five cents per day, while attending on the same; but, if the defendant obtain the new trial, and the plaintiff then recover a sum equal to or greater than the original verdict, the latter shall have judgment for all the costs accrued on such suit, together with seventy-five cents per day whilst attending the same.

This section, it is thought, does not refer to actions where *land* is to be recovered, speaking, as it does, of the recovery of "a sum equal or greater," &c., and that, consequently, the law remains the same as it was before, as to costs, on setting aside a verdict in ejectment.<sup>1</sup>

## SECTION II.

### OF ARREST OF JUDGMENT.

By Act 27th of March 1713, § 2,<sup>2</sup> it is provided, that where judgment is given for the plaintiff, and the same be reversed by error, or a verdict passed for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, he must commence a new action within a year after such reversal or arrest of judgment and not after.<sup>3</sup>

By Act of 2d August 1842, § 12,<sup>4</sup> in all cases where judgment shall be arrested on account of the insufficiency of the declaration, a new suit shall not be commenced until the costs shall be paid in the first suit.<sup>5</sup>

The rules of court regulating the practice in obtaining new trials, in the Supreme and District Courts, govern, for the most part, that pertaining to motions in arrest of judgment, and have already been noticed.<sup>6</sup> In the English Common Pleas, "no judgment shall be stayed beyond the time when it should regularly be entered, by a motion in arrest of judgment, unless the court shall previously have granted a rule to show cause why the judgment should not be arrested; in proceeding upon such motion, the same course will be observed as in cases of motion for new trials—and on every such motion, reasons, in writing, must be exhibited to the court, and filed if the rule be granted. A motion in arrest of judgment is an application to the court on the part of the defendant to withhold judgment for the plaintiff on the ground that there is *error appearing on the face of the record*, which vitiates the proceedings. In consequence of such error, on whatever part of the record it may arise, from the

<sup>1</sup> Brac. L. Mis. 465, 466; see 2 Arch. v. Albert, 5 W. & S. 339; Harris v. Pr. 228, as to costs on new trial: see Dennis 236.  
*post*, "Costs;" and Brightly on Costs

<sup>2</sup> 1 Smith 76. Purd. Dig. 656.

<sup>3</sup> Ebersoll v. Krug, 5 Binn. 55; Given

<sup>4</sup> Pamph. L. 460, Purd. Dig. 808.

<sup>5</sup> Smith v. Sharp, 5 Watts 292.

<sup>6</sup> *Vide supra*, 615.

commencement of the suit to this period, the court are bound to arrest the judgment. It is, however, only with respect to objections apparent on the *record*, that such motion can be made, nor can it be made, generally speaking, in respect to *formal* objections. This was formerly otherwise, and judgments were constantly arrested for errors of mere form;<sup>1</sup> but this abuse has been long remedied by certain statutes, passed at different periods, to correct inconveniences of this kind, and commonly called the *statutes of amendment* and *jeofails*, by the effect of which, judgment at the present day cannot, in general, be arrested for any objection of form."<sup>2</sup>

The reasons or causes appearing on the record which will suffice to arrest a judgment, are, first, where the declaration varies totally from the original writ, as where the writ is in debt, and the plaintiff declares in an action on the case for an *assumpsit*.<sup>3</sup> The defendant cannot move in arrest of judgment for anything which might have been pleaded in abatement;<sup>4</sup> and if there be a misjoinder of counts, and a verdict for the plaintiff on the counts well joined, and for the defendant on the other, the misjoinder is not a cause for arresting the judgment.<sup>5</sup>

Also, secondly, where the verdict materially differs from the pleadings and issue thereon.<sup>6</sup>

And thirdly, if it appear by the declaration, that the plaintiff had not a cause of action, as, if he declare as endorsee on a promissory note, which he stated to have been made payable to one V. and not to order.<sup>7</sup> This defect of title (which will always be apparent from the record) would likewise cause the judgment to be arrested in a court of error; therefore it is a general rule that any exception which may be taken advantage of on a writ of error, may also be taken advantage of on a motion in arrest of judgment.<sup>8</sup> It is also a general and invariable rule with regard to arrests of judgment, upon matter of law, that whatever is alleged in arrest of judgment must be such matter as would upon *demurrer* have been sufficient to overturn the action or plea. Therefore, in slander, judgment cannot be arrested, because the words were proved on the trial to have been spoken after the writ issued.<sup>9</sup> But the rule will not hold *e converso*, "that everything that may be alleged as cause of demurrer will be good in arrest of judgment," for if a declaration or plea omit to state some particular circumstance, without proving of which, at the trial, it is impossible to support the action or defence, this omission shall be aided by a verdict.<sup>10</sup> For a verdict ascertains those facts, which before, from the inaccuracy of the pleadings, might be dubious; since the law will not suppose that a jury under the direction of a judge would find a verdict for the

<sup>1</sup> See 2 Reeves, II. E. L. 448; 3 Bl. 6 Binn. 307.  
Com. 407.

<sup>2</sup> Steph. on Plead. 117, 1st ed., note (7), p. cxxvii., 7th Am. Ed.

<sup>3</sup> 3 Bl. Com. 393.

<sup>4</sup> Bingh. on Judg. 80.

<sup>5</sup> 2 M. & S. 533; Wenberg v. Homer,

<sup>6</sup> 3 Bl. Com. 393.

<sup>7</sup> Hartshorne's Lessee v. Patton, 2 Dallas 252.

<sup>8</sup> Ibid.

<sup>9</sup> Skinner v. Robeson, 4 Yeates 375.

<sup>10</sup> 3 Bl. Com. 394.

plaintiff or defendant, unless he had proved those circumstances, without which his general allegation is defective.<sup>1</sup> Exceptions, therefore, that are moved in arrest of judgment, must be much more material and glaring than such as will maintain a demurrer; or, in other words, many inaccuracies and omissions, which would be fatal, if early observed, are cured by a subsequent verdict; and not suffered, in the last stage of a cause, to unravel the whole proceedings.<sup>2</sup> But if the thing omitted be essential to the action or defence, as if the plaintiff does not merely state his title in a defective manner, but sets forth a title that is totally defective in itself, or if to an action of debt the defendant pleads *not guilty* instead of *nil debet*, these cannot be cured by a verdict for the plaintiff in the first case, or for the defendant in the second.<sup>3</sup> But the plea of *not guilty* in *assumpsit*, is cured by a verdict *for the plaintiff*; <sup>4</sup> for the defendant cannot take advantage of his own misleading to arrest the judgment.<sup>5</sup>

After judgment on a demurrer, the judgment cannot be arrested, whether the demurrer were argued or not; <sup>6</sup> but it is otherwise in case of judgment by default.<sup>7</sup>

Where the declaration consists of two counts, and there is a general verdict for the plaintiff, and the action can be maintained only on one, the court will allow the plaintiff, after motion in arrest of judgment, to enter the verdict on the proper count.<sup>8</sup> If the judgment be arrested erroneously, the Supreme Court will, on error, enter judgment upon the verdict.<sup>9</sup> Judgment may be arrested for an objection on the face of the record, though it was not assigned at the time of filing the motion.<sup>10</sup> The day on which the verdict is entered is one of the four days, within which a motion in arrest of judgment must be made.<sup>11</sup> Before the Act of 1842, above given, if judgment was arrested, each party paid his own costs.<sup>12</sup> A writ of error will lie on a judgment arrested; because the order to arrest the judgment is in nature of a judgment.<sup>13</sup> As has already been observed, judgment will be arrested when, after verdict, it appears that the court has no jurisdiction.<sup>14</sup> It is not ground for arrest of

<sup>1</sup> 3 Bl. Com. 394.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid. 395.

<sup>4</sup> *Cavene v. McMichael*, 8 S. & R. 441.

<sup>5</sup> 12 Johns. 353.

<sup>6</sup> 1 Str. 425; 6 Taunt. 650.

<sup>7</sup> 1 Str. 425; 1 Caines's Rep. 104.

<sup>8</sup> *Burrall v. Dublois*, 2 Dallas 229.

<sup>9</sup> *Wilson v. Gray*, 8 Watts 25.

<sup>10</sup> *Grasser v. Eckart*, 1 Binn. 575.

<sup>11</sup> *Burrall v. Dublois*, 2 Dallas 229.

<sup>12</sup> Cowp. 407; 11 Johns. 141.

<sup>13</sup> *Benjamin v. Armstrong*, 2 S. & R. 392.

<sup>14</sup> *Baugh v. Bartram*, D. C., Saturday, July 1st 1848. Motion in arrest of judgment. *Per curiam*. It appears by the record, that on the trial the judge refused to permit the defendant

to plead specially to the jurisdiction of the court, that the amount in controversy was under \$100. He did this upon the ground that a plea to the jurisdiction is in abatement, and cannot be put in after a plea in bar. In this we think there was error. Objections to the jurisdiction of a court of limited jurisdiction as to the nature of the actions instituted in it, and not where it is a mere matter of personal privilege in a defendant to be sued in a particular court, may be pleaded in bar or abatement (1 Chitty's Pl. 426, p. 6). As this is an error appearing upon the face of the record for which the judgment would be reversible, we think the proper course is to arrest the judgment, set aside the verdict, and award a *re*.

judgment in an action upon a special warranty, broken by the grantor's giving a mortgage after his conveyance to the plaintiff, under which mortgage the premises were sold, that the declaration does not state the plaintiff's failure to record his deed, though without such failure the sale under the mortgage would not have harmed the plaintiff.<sup>1</sup>

*venire de novo*. Accordingly, defendant granted defendant to file special plea has leave to file the special plea; leave to the jurisdiction. See *ante*, 18-9. to do which was refused on the trial. <sup>1</sup> Lukens v. Nicholson, D. Ct. Phila., Judgment arrested, verdict set aside, HARR, J., 17 Leg. Int. 145, 4 Phila. *venire de novo* awarded, and leave Rep. 22, s. c.

## CHAPTER XX.

### OF JUDGMENT.

#### SECTION I. ENTERING JUDGMENT. P. 624.

Four days allowed upon verdict for motion for new trial or in arrest of judgment.

The jury fee.

Computation of time.

Time allowed for filing exceptions to award under Act of 1705.

The entry of judgment by prothonotary on court docket.

The judgment index—its purposes, objects, and effects.

Special judgments and judgments with conditions.

Judgment against a feme covert on a bond given while sole.

Judgment for costs on settlement of case on trial-list.

Entry of judgment on confession in writing.

Entry of judgment *nunc pro tunc*.

Requisites of verdict.

Act of April 3d 1843, in regard to failure or omission of prothonotary, before its passage, to enter judgments on the judgment index.

Act of April 16th 1849, in relation to effect of Act of 1843.

#### SECTION II. WHEN LIEN OF JUDGMENT BEGINS TO RUN. P. 632.

What interest in land is bound by judgment.

Judgment against equitable vendee—interest of assignor in unconverted estate.

Effect of revival of judgment by *scire facias post annum et diem*.

How priority of judgment governed in various cases.

Lien of judgments entered on same day.

Contest between judgment and mortgage, and between judgment and conveyance.

Lien of judgment against vendee of land before conveyance of legal title.

Lien of ground-rent and of arrears of same.

Lien of judgment for purchase-money.

Transcripts of judgment before magistrate in Common Pleas

Revival of such judgments by *scire facias*.

Lien of judgment in Supreme Court of the State, and in Circuit Court of the United States.

#### SECTION III. JUDGMENT AGAINST DECEASED PERSON. P. 639.

Death of either party between verdict and judgment.

Discretion of the court in entering judgment as of past time.

Judgment erroneously entered not void collaterally.

Effect of death of one of several defendants before judgment.

Practice in this State in regard to execution where debtor dies before judgment.

Revival of judgments by *scire facias* against personal representatives.

#### SECTION IV. JOINT JUDGMENT. P. 642.

Against one partner in a suit against two, without service or return of *nihil habet* against the other.

Assessment of damages in *assumpsit* against several, where some appear and some make default.

Severance of joint action.

Distinct judgments on same record.

Judgment on a verdict for damages payable by instalments.

Judgment where one of two defendants is in default.

Damages assessed conditionally.

Form of verdict in debt, where debt and interest exceed the sum demanded in writ.

Judgment in action for legacy charged on real estate.

#### SECTION V. AMENDMENT OF JUDGMENT. P. 645.

Common law and early statutes in regard to amendments.

Power of court in altering or amending judgments.

Power of Supreme Court to *modify* judgments.

Void and voidable judgments.

Judgments against executors or administrators, on the various pleas which may be filed by them.

When plea of *plene administravit* is proper plea.

#### SECTION VI. INTEREST ON JUDGMENTS. P. 649.

Interest on judgment given as security.

Interest suspended from the day when land is sold on execution.

Interest after affirmance of judgment in the Supreme Court.

Interest on verdict.

#### SECTION VII. JUDGMENT ON BALANCE FOUND DUE DEFENDANT. P. 650.

Defendant entitled to judgment on balance found due him.

#### SECTION VIII. OPENING JUDGMENTS. P. 651.

By whom the motion may be made and for whose use; and herein of opening a judgment *directly* and *collaterally*, and the effect and nature of *fraud* in relation to judgments.

Practice of the several courts in regard to issues to try questions of fact.

How an issue may be obtained in the Court of Common Pleas in a matter before an auditor of the Orphans' Court.

What character of defence must be shown.

Judgment on a transcript filed in the Court of Common Pleas cannot be opened to let the defendant into a defence.

What excuse given for default.

Within what time motion must be made.

Practice in opening judgments.

How far the decision of a court of original jurisdiction on a motion to open is the subject of review on error.

#### SECTION IX. ASSIGNMENT OF JUDGMENTS. P. 666.

When execution may issue by owner of judgment without assignment.

Assignment of judgment carries with it a mortgage to secure bond on which it was entered.

Equities between original parties.

No covenant or warranty implied by assignment.

Doctrines of notice.

#### SECTION X. TRANSFER OF JUDGMENTS TO OTHER COUNTIES. P. 668.

At what time an award of arbitrators is the subject of transfer.

Power of the court of the county, to which judgment is transferred, over it.

#### SECTION XI. ENTRY OF SATISFACTION OF JUDGMENT. P. 669.

Act of 1791, to enforce entry of satisfaction.

What may be equivalent to the entry of satisfaction.

What judgments are within the Act of 1791.

Fraudulent entry of satisfaction.

Act of 1851 in regard to entry of satisfaction of judgments over ten years old.

THE practical questions connected with this delicate and difficult branch of inquiry will be noticed under the eleven general heads or sections which have been announced in the *synopsis of contents* placed at the beginning of the present chapter.

### SECTION I.

#### ENTERING JUDGMENT.

Upon the verdict of a jury, four days are allowed by our practice generally throughout the State, for the entry of a motion for a new trial, or in arrest of judgment. A specific rule of each particular court regulates the whole subject. It is a doctrine of the common law, that a reasonable delay after verdict should be permitted before judgment is signed, and would exist in the absence of a rule of court.<sup>1</sup> The same time is allowed the defendant in the case of an award of referees under the 3d section of the Act of 1705;<sup>2</sup> and upon an award of arbitrators under the compulsory act, the appeal must be entered within twenty days after the day of the entry of the award of the arbitrators on the docket of the court. On the subject

<sup>1</sup> *Burrall v. Dublois*, 2 Dallas 229; *Lane v. Shreiner*, 1 Binn. 292; *Maguire v. Burton*, 1 Miles 17.

<sup>2</sup> 1 Sm. Laws 50.



of the computation of time it is settled, that whenever, by a rule of court or an Act of Assembly, a given number of days are allowed to do an act, or where it is said that an act may be done within a given number of days, the day in which the rule is taken or the decision made, is excluded; and if one or more Sundays occur within the time they are counted, unless the last day falls on Sunday, in which case the act may be done on the next day;<sup>1</sup> therefore, in computing the twenty days, the rule is, that the day on which the report is filed, or the day on which the appeal is entered, should be excluded.<sup>2</sup>

"According to our practice, judgment is signed by writing that word in the docket, to serve as a memorandum for making up the record in form, which, however, is seldom if ever done."<sup>3</sup> In general, the pleadings, issue, and verdict show plainly enough what the judgment ought to be, in cases where any question arises as to what the word in the docket extends, whether it affects lands and persons, or lands alone.<sup>4</sup> So the word refers to another part of the record, where a right is confessed subject to which the judgment is entered.<sup>5</sup> In order to secure a judgment upon a verdict, the successful party is required by the Act 29th March 1805<sup>6</sup> to pay the sheriff the sum of four dollars, the jury fee. This form is rendered essential in some, and would seem to be generally observed in all courts. In the District Court of Philadelphia county, the rule further directs that the judgment be dated on the day of its entry, which cannot be made without a special order until payment of the fee.<sup>7</sup> It does not follow, however, that judgment may be entered during the four days by paying the fee. That court has recently decided that it cannot be done without their special order, and if the prothonotary enter judgment *nisi* it has no legal effect. The rule allows four days for a motion for a new trial or in arrest of judgment, and by construction this excludes the day in which the verdict is rendered, and if a Sunday intervene it is also excluded. It was formerly supposed that the entry of judgment *nisi* had a peculiar meaning, and though made within the four days, operated as a lien—but it never was judicially recognised, and was wholly at variance

<sup>1</sup> *Sims v. Hampton*, 1 S. & R. 411; *Goswiler's Estate*, 3 Pa. R. 201. There has been, recently, vacillation in the authorities, upon the law with regard to computation of time. The cases of *Sims v. Hampton* and *Goswiler's Estate*, and the other authorities, were overruled, one of them expressly, by the Supreme Court in *Thomas v. Afflick*, 4 Harris 14, which decided that the rule of computation was to include the *first* day and exclude the *last*. This case was followed by *Barber v. Chandler*, 5 Harris 49, which announced the same doctrine. Then came the case of *Cromelien v. Brick*, 5 Casey 522, which restored, as it would seem, the old doctrine of the early cases as it is

VOL. I.—40

stated in the text. See also *Agnew v. The City*, 2 Phila. 340; *Clauson v. Eichbaum*, 2 Grant 130; *Marys v. Anderson*, *Ibid.* 446; *Marks' Ex. v. Russell*, 4 Wright 372.

<sup>2</sup> *Frantz v. Kaser*, 3 S. & R. 395; *Thomas v. Loan Association*, 16 Leg. Int. (1859) 174.

<sup>3</sup> *Hussey v. White*, 10 S. & R. 347.

<sup>4</sup> *Coyle v. Reynold's Executors*, 7 *Ibid.* 329, 330.

<sup>5</sup> *Reidmann v. Killinger*, 11 *Ibid.* 119, 121.

<sup>6</sup> 4 Sm. Laws 242, *Purd. Dig.* 807, § 13.

<sup>7</sup> Rule 43, D. C. Phila. See *Ash v. Patton*, 3 S. & R. 303.

with principle. The practice of the King's Bench is, however, not in force, which requires a rule for judgment to be entered. No rule is necessary, nor need the court be applied to for leave to enter judgment, but after the four days, should no motion be pending, the prevailing party on paying the fee is entitled to have judgment signed by the prothonotary, not *nisi*, but *absolutely*.<sup>1</sup> And in connection with the former Court of Nisi Prius, it was decided that, under the 4th section of the 18th rule of that court, judgment could not be entered on a verdict rendered at Nisi Prius within the first four days of the term, nor during the pendency of a motion for a new trial, unless the court should have ordered judgment to be entered to stand as a security.<sup>2</sup> Under this rule, therefore, the plaintiff might at the first day of the court move for judgment, and if by the report of the judge who tried the cause it was deemed proper he should have it as a security, it was immediately ordered. In no case, however, could it be entered until the jury fee was paid, nor until the sitting of the court in banc.<sup>3</sup>

To give an award of referees under the Act of 1705 the same effect as the verdict of a jury, it is necessary that it should be submitted to the court for their approbation, unless it is agreed that judgment be entered on the award: the first Saturday succeeding their filing is fixed for reading the reports of referees in open court.<sup>4</sup> And the rule is that, unless exceptions to the report be filed within four days afterwards, the judgment *nisi* becomes absolute.<sup>5</sup> Particular circumstances will, however, induce the court to hear motions to set aside reports of referees, though exceptions have not been filed within that time.<sup>6</sup> Under the rule of court, it is not necessary that notice should be given of reading the report in court; it is sufficient if notice is given that the report is *filed*, and the four days run from the time of such notice.<sup>7</sup> As to reports not read on that day, whether brought into court or not, filed in the office in term time or vacation, no executions are to issue thereon until notice in writing is given to the opposite party, after which notice, such party has four days to file his reasons.<sup>8</sup>

By the Act for the Prevention of Frauds and Perjuries,<sup>9</sup> it is enacted that any judge, or officer of any of the courts of record, shall at the signing of any judgments, without fee, set down the day of the month and year of his so doing upon the paper, book, docket, or record which he shall sign, which date shall be entered upon the margin of the record where the said judgment shall be entered. In addition to the entries made by the prothonotaries of the several courts in their respective appearance, continuance, or judgment dockets, an entry of the parties' names, term and number, date and amount of the judgment is made in a docket, called the judgment-

<sup>1</sup> Maguire v. Burton, 1 Miles 14; 2 Tidd's Pr. 644.

<sup>2</sup> Britton v. Stanley, 1 Wh. 267.

<sup>3</sup> Ibid.

<sup>4</sup> Rule 75, D. C. Phila.; Walker's Rules, 27, 40.

<sup>5</sup> Shewell v. Wycoff, 1 Dallas 312.

<sup>6</sup> Boyer v. Rees, 4 Watts 202; and see Davis v. Canal Navigation Co., 4 Binn. 296.

<sup>7</sup> Duncan v. Calbraith, 1 Browne 14.

<sup>8</sup> See Barre v. Affleck, 2 Yeates 274.

<sup>9</sup> 1 Sm. Laws 390; Purd. Dig. 461,

§ 1.

index, in alphabetical order, commencing with the name of the debtor; and referring to the judgment itself.<sup>1</sup> It was originally invented by courts for their own ease, as well as the security of purchasers, to avoid the inconvenience of turning over the rolls at large;<sup>2</sup> and the practice of docketing judgments appears to have first obtained in the Court of Common Pleas, where the dockets were entered on a separate roll, called the docket-roll.<sup>3</sup> In entering judgments on bonds and warrants of attorney, the prothonotary complies substantially with the Act of 24th February 1806, by entering the names of the obligors and obligees in the form of an action as parties, the date of the bond and warrant, the penal sum, the real debt, the time of entering judgment, and the date of the judgment, on the margin of the record.<sup>4</sup> A judgment entered by him under this act, on the application of the *obligor*, without authority from or notice to the obligee or assignee, was decided to be irregular and was therefore struck off.<sup>5</sup> The prothonotary is not the agent of either party or of the law, and if the defendant in the judgment pays him the amount, it is no discharge of the debt.<sup>6</sup> The judgment index may be referred to at reasonable times by the attorneys of the courts, and presents to creditors, purchasers, and others a ready access to information, important to their respective interests. As the officers are liable for the consequences of neglect in the entering or searching for judgments, particular accuracy is requisite in the discharge of this branch of their duties.

By our practice, final judgment on an inquisition or liquidation by the prothonotary, is seldom formally entered, though it may be done at any time, if required, on application to the court. These interlocutory judgments are afterwards liquidated, and whether by inquest, or by the prothonotary, under the court's guidance, is immaterial.<sup>7</sup>

An entry by a prothonotary on his docket, as follows: "A. v. B., plaintiff files of record a judgment-bond, under the hand and seal of the defendant, for the sum of \$5450, conditioned for the payment of \$2725, on or before November 5th next; entered the 17th May 1815," is a good entry of judgment, under the Act of 24th February 1806.<sup>8</sup>

The amount for which the judgment is entered in the "lien or judgment" docket, kept by the prothonotary in accordance with the

<sup>1</sup> Act of 29th March 1827, 3 Sm. Laws 319; Purd. Dig. 463, § 3. Subsequently was passed the Act of 22d April 1856, as follows: "The lien of no judgment, recognisance, execution levied on real estate in the same or another county, or of writs of *scire facias* to revive or have execution of judgments, shall commence or be continued as against any purchaser or mortgagee, unless the same be indexed in the county where the real estate is situated, in a book to be called the judgment index; and it shall be the duty of the prothonotary

or clerk forthwith to index the same according to priority of date, and the plaintiff shall furnish the proper information to enable him to perform said duty:" Pamph. L. 532, Purd. Dig. 1183, § 2.

<sup>2</sup> Gilb. C. P. 164.

<sup>3</sup> Cro. Car. 74; Sid. 70.

<sup>4</sup> Commonwealth v. Conard, 1 Rawle 249.

<sup>5</sup> Ingersoll v. Dyott, 1 Miles 245.

<sup>6</sup> Baer v. Kistler, 4 Rawle 364.

<sup>7</sup> Bennet v. Reed, 10 Watts 396.

<sup>8</sup> Helvete v. Rapp, 7 S. & R. 306.

Act of 1827,<sup>1</sup> and not that stated in the appearance or continuance docket, determines the party's claim.<sup>2</sup>

So far as concerns the sheriff, and as will presently be seen, subsequent judgment-creditors, this doctrine is by no means shaken, either in principle or application, by the Act of 1843.<sup>3</sup> In 1845, the Supreme Court expressly ruled that the sheriff, in order to ascertain the judgments that were liens upon the land, was not bound to look further than the judgment-docket, and was relieved from any responsibility as to a misapplication of the proceeds by the prothonotary's certificate. So far from there being any breach of duty in paying the fund in court to a creditor whose judgment, though subsequent, was indexed antecedently, it was declared that in so doing he had faithfully and properly performed it;<sup>4</sup> though in the same year it was ruled that where the entry in the index was greater than the amount actually due, the creditor can take only the actual debt.<sup>5</sup> And again, as late as 1850, it was determined that if the Christian names of defendants in a judgment are not entered on the judgment-docket, the judgment, though valid as between the parties, cannot affect subsequent purchasers or judgment-creditors.<sup>6</sup> But a description of persons by the names by which they are commonly known is sufficient, and as much as the Act of Assembly meant to require; and therefore the Supreme Court held, where a judgment was entered on the appearance and lien dockets against "A. Jones," whose name was "Abel Jones," and it was proved that he was well known by the abbreviated designation, and that he uniformly wrote his name in that way, and that there was no other person in the county for whom it would answer, that the lien was well entered and was entitled to a preference over one subsequently entered against "Abel Jones." "This is not the case," said the court, "of an omitted Christian name, for the Christian name as commonly understood was inserted. The entries on the docket must conform to the popular understanding of the names of the individuals."<sup>7</sup>

The effect of the judgment-docket is simply to give notice to purchasers, subsequent encumbrancers, and all others in interest. The judgment does not depend for its validity, as between the parties, upon its entry in the judgment-docket. The docket forms no part of the rolls of the court, which constitute the true record.<sup>8</sup> It was established for the same purposes for which records of deeds, mortgages, and wills were provided—to be a notice to purchasers and others acquiring rights in real estate. And hence a defective entry in the judgment-docket simply fails to give such notice. Therefore, if a party holding a valid judgment, which he has failed to have docketed according to law, bring home notice of it to a subsequent encumbrancer, before his rights attach, he has done all which the

<sup>1</sup> Purd. 994. [This was a defect in the execution of the power, not in the want of it: *Rabe v. Hieslip*, 4 Barr 140.]

<sup>2</sup> *Bear v. Patterson*, 3 W. & S. 233; though see Acts of 1843–9, *post*, 632.

<sup>3</sup> *Post*, 632.

<sup>4</sup> *Mann's Appeal*, 1 Barr 25.

<sup>5</sup> *Hance's Appeal*, *Ibid.* 408.

<sup>6</sup> *Wood v. Reynolds*, 7 W. & S. 406.

<sup>7</sup> *Jones's Estate*, 3 Casey 336.

<sup>8</sup> By Act of May 6th 1864, Pamph. Laws 875, and March 23d 1865, Pamph. Laws 599, it is provided that judgments entered on the judgment-indexes in certain counties shall be valid.

judgment-docket was invented to accomplish. In conformity with these principles it was held that a judgment against a firm, entered on the judgment-docket, without setting forth the Christian names of the several partners, is without effect as a lien so far as respects subsequent purchasers and encumbrancers. But if a subsequent encumbrancer have *actual* notice that A. B., a member of the firm against whom the judgment is thus entered, is the person against whom he holds his judgment, before his rights attach, it is equivalent to the constructive notice required to be given by the entry on the judgment-docket.<sup>1</sup> It is the duty of the judgment-creditor to see that his judgment is rightly entered in the judgment-docket.<sup>2</sup>

The court will enter judgment specially, so as to show that it binds only property held in trust by the defendant, and which was the sole purpose of the suit.<sup>3</sup> The court will also, in certain cases, annex conditions to judgments; and a condition accompanying a judgment, by which it is to be released on the payment of a sum of money, &c., is in the nature of an injunction to stay proceedings at law. But where time is given for the payment of purchase-money, by the judgment of the court in an action of ejectment, the amount should be ascertained and stated on the record before the time begins to run.<sup>4</sup>

It is discretionary to enter the verdict on particular counts, and unless the whole testimony is brought up on error this cannot be examined above.<sup>5</sup>

Where, in an action pending, the presiding judge marked on the margin of the trial-list, "Judgment for plaintiff; sum to be liquidated by the prothonotary," it will be presumed that the judgment was entered with the assent and acquiescence of the defendant.<sup>6</sup>

Where the record stated that "a jury was called and sworn, and the same day the jury was discharged, and judgment given for plaintiff," it was held on error that the court below had given judgment after argument or with the acquiescence of parties.<sup>7</sup>

Judgment entered two days before verdict is not void, as the record might be amended by the court at any time.<sup>8</sup>

By the various Acts of Assembly, the docket is recognised as the proper and only place for the entry of the judgment, and its entries cannot be controlled by memoranda on loose scraps of paper filed as parts of the proceedings.<sup>9</sup> The judgment-docket is *prima facie* evidence of the order in which liens are entered.<sup>10</sup>

When a case, when called for trial, is stated by counsel to be settled, the proper practice is for the judge to enter a formal judgment for the costs, if there be an agreement to that effect. If there be not, the plaintiff will be nonsuited, under the 2d section of the Act of April 14th 1846, unless a legal ground for continuance be shown.<sup>11</sup>

<sup>1</sup> The York Bank's Appeal, 12 Casey 458.

<sup>2</sup> Ridgway's Appeal, 3 Harris 177. See *post*, 632.

<sup>3</sup> Aysinena v. Peries, 2 Barr 286.

<sup>4</sup> Harmar v. Holton, 1 Casey 245.

<sup>5</sup> Haldeman v. Martin, 10 Barr 369.

<sup>6</sup> Hays v. Commonwealth, 2 Harris 39; Seybert v. Bank, 5 Watts 307.

<sup>7</sup> Seybert v. Bank, 5 Watts 307; Hays v. Commonwealth, 2 Harris 39.

<sup>8</sup> Myers v. Clark, 3 W. & S. 536.

<sup>9</sup> See ROGERS, J., Crutcher v. Commonwealth, 6 Wh. 347.

<sup>10</sup> Polhemus's Appeal, 8 Casey 328.

<sup>11</sup> Thomas v. Kast, D. C., February 26th 1848. Why *fi. fa.* should not be set aside and judgment opened. *Per*

Where a feme gives bond and warrant, and marries, the practice is, to move the court for leave to enter it against her and her husband, on filing a declaration and an affidavit of the facts. Though he had given no express authority, yet it is implied from the fact of marriage, his own voluntary act. If the agreement be entered without leave of court, it will be set aside. And where it can be done without risk, it is better to give previous notice to the husband, although the ruled cases seem not to require this.<sup>1</sup> A judgment given by a married woman for a debt contracted for the improvement of her real estate, is void. But a wife may agree to revive a judgment which was entered on a bond executed by her before marriage.<sup>2</sup>

A warrant of attorney to confess judgment, given by a *feme sole*, is not revoked by her subsequent marriage. Judgment may be entered upon it, since the passage of the Act of 11th April 1848, against the husband and wife: but it should be so limited as to allow only the property of the wife to be levied upon and sold.<sup>3</sup>

There can be but one final judgment in any personal action, whether founded in contract or tort, because the simplicity of the common law allows no incongruity in its forms, and requires that all the various entries on the record should exhibit a consistent whole. The symmetry of legal proceedings, however marred by legislative inconsistencies and professional looseness, has not yielded so far as to admit of distinct judgments of the same kind in the same action.<sup>4</sup>

*curiam*. When this case was called for trial, during the present term, it was stated to the court, by the plaintiff's counsel, that it had been settled—that entry was accordingly made on the judge's trial-list. One of the judges of the Supreme Court, in delivering the opinion of that court (*Moore v. Kline*, 1 Pa. R. 133), has condemned this as "certainly a loose mode of doing business," though he adds, that he is not prepared to say it is a nullity when on the record. "It would, perhaps, amount to an entry of satisfaction, or a discontinuance." It is on this account that the judge before whom this cause was called, when such a suggestion is made, requires to be informed by the counsel if any agreement has been made as to the costs, and enters a formal judgment for the costs accordingly. Otherwise, he nonsuits the plaintiff, under the 2d section of the Act of 14th April 1846, unless a legal cause for continuance is shown. In this way all doubt as to the character of the entry is avoided, and the suit is finally and conclusively determined and ended. In accordance with this practice, in the case before us, the counsel for plaintiff informed the judge that the defendant was to pay the costs, and taking it for granted that such was the arrangement, judgment was entered

accordingly. It now appears that this was a misapprehension on the part of the plaintiff's counsel, and that the case had been settled by the parties, out of court, without their counsel, and a receipt in full given by the plaintiff, without any mention of the subject of costs. It is clear that, in such a case, each party bears his own costs: *Watson v. Depeyster*, 1 Caines 66; *Johnston v. Brannan*, 5 Johns. 268; *Herkimer Co. v. Small*, 2 Hill 127. Such a settlement is in effect an agreement to discontinue, and judgment might be entered that the plaintiff pay the costs of the office, that is, those which have not been already advanced as the suit proceeded, but not the costs of the defendant or his attorney. The entry in this case, then, is clearly wrong. The court, therefore, make absolute this rule, so far as regards setting aside the execution issued by the plaintiff for costs, and instead of opening the judgment as asked for, they direct it "to be set aside as having been improvidently rendered." Execution and judgment against defendant for costs set aside.

<sup>1</sup> *Eneu v. Clark*, 2 Barr 236.

<sup>2</sup> *Brunner's Appeal*, 11 Wright 67.

<sup>3</sup> *Baker v. Lukens*, 11 Casey 146.

<sup>4</sup> *O'Neal v. O'Neal*, 4 W. & S. 131.

The 8th section of the Act of 1806, authorizing the prothonotary to enter judgment on a confession in writing by the defendant, attested by two witnesses, is affirmative, and does not prohibit the entry of judgment according to a practice existing prior to its date, and,<sup>1</sup> therefore, an agreement of the parties, not under seal, nor attested by witnesses, for an amicable action, and that the prothonotary should enter judgment for a certain sum, was held sufficient.<sup>2</sup>

Where a judgment is entered on a judgment-bond, containing the usual stipulation for a release of errors, for its full amount, credit may be given for any money paid on account before the entry, upon the back of the *fi. fa.*<sup>3</sup>

The Act of 2d August 1842, § 6,<sup>4</sup> provides that in proceedings to revive judgments which have been entered at different times against several defendants, the day of the date of the last entry shall be recited in those proceedings; and that such entries shall operate as if they had been made at the date of the latest entry.

The entry of judgment *nunc pro tunc* is not of right but of favor. It rests in discretion, influenced in its exercise by peculiarity of circumstances, and its propriety is not, therefore, to be inquired into by writ of error. It might be otherwise by appeal, were that form of removal provided. A party seeking to avoid the consequences of delay, must not appear to have consented, much less contributed, to its production; thus, if the judgment were suspended by exceptions on both sides, of which the procrastination, attempted to be charged exclusively on one party, was an inevitable consequence, the rule does not apply.<sup>5</sup>

The strict form in verdict formerly required, is now unnecessary. It needs only to be understood what the intention of the jury is, agreeably to which the clerk may mould it into form; and if the verdict is good, the judgment must likewise be so; for being entered generally, when drawn at large it may be put into form.<sup>6</sup> In our practice, judgments are all entered in short memoranda, the prothonotary merely writing the word "judgment" on the record. In general, the pleadings, issue, and verdict show plainly enough what the judgment ought to be; but any uncertainty or obscurity in the judgment, as, for example, on a *scire facias* against heirs and tenants, the courts, when called upon, must explain. Should plaintiffs attempt to injure the defendants under such a judgment, by taking execution against their persons, or other lands than those bound by it, the court will interfere and do justice in a summary way.<sup>7</sup> Irregularities in obtaining a judgment are not a ground for dismissing the suit, but only for correcting the proceedings upon it. Hence, where in a case of foreign attachment in debt, the plaintiff having filed a statement under the Act of 1806 and afterwards a

<sup>1</sup> Cook v. Gilbert, 8 S. & R. 567; McCalmont v. Peters, 13 Ibid. 196. See ante, 352, 396.

<sup>2</sup> Cook v. Gilbert, *ut supra*.

<sup>3</sup> Davis v. Hood, 1 Harris 171.

<sup>4</sup> Pamph. L. 459, Purd. Dig. 577.

<sup>5</sup> Ley v. Union Canal Co., 5 Watts 104.

<sup>6</sup> Per McKean, C. J., Thompson v. Musser, 1 Dallas 462; see Easton v. Worthington, 5 S. & R. 133.

<sup>7</sup> Coyle v. Reynolds's Executors, 7 S. & R. 329, 330; and see Lewis v. Smith, 2 Ibid. 155; Bower v. Blessing, 8 Ibid. 243; Reidenauer v. Killinger, 11 Ibid. 119.

declaration in *assumpsit*, took judgment for default of appearance, and the court on suggestion of these and other irregularities set aside the judgment and dissolved the attachment, it was error.<sup>1</sup>

The Act of 1806 directed some peculiarities in the mode of entering judgment, as well as in the other proceedings in a suit; but as it is left to the party to pursue its provisions or not, at his pleasure, a further notice of it is not deemed necessary.<sup>2</sup>

The Act of April 3d 1843, § 1,<sup>3</sup> provides for cases of failure or omission of prothonotaries and other officers before its passage, to enter upon the judgment-dockets of their respective counties any judgments or other liens according to the directions of the general act, that of 1827, which made provision for the keeping of these dockets throughout the State, and declares that such failure or omission shall not invalidate or impair these judgments, if they have been properly entered on the appearance or continuance dockets of the courts. The act also provides that *bonâ fide* purchasers without notice of the omission to make the entries upon the judgment-dockets, shall not be affected by the terms of the statute. But it has been held that the act does not cure a defective or erroneous entry in the judgment-docket.<sup>4</sup>

Subsequently the Act of April 16th 1849, § 5,<sup>5</sup> was passed, which provides that the Act of April 3d 1843, just referred to, shall not affect the rights of judgment-creditors whose judgments had been properly entered in the judgment-dockets.

Acts similar to that of April 3d 1843 have been passed to supply like omissions in the counties of Cambria and Union,<sup>6</sup> Lycoming,<sup>7</sup> Tioga,<sup>8</sup> Montgomery,<sup>9</sup> and Potter.<sup>10</sup>

## SECTION II.

### WHEN LIEN OF JUDGMENT BEGINS TO RUN.

A judgment regularly entered, has a preference over subsequent judgments against the same defendant as a lien upon his lands.<sup>11</sup> In Pennsylvania, the lien of judgments has been extended beyond the limits of the common law, embracing every kind of equitable and even an inchoate interest in land, and every right vested in the debtor at the time of the judgment;<sup>12</sup> but that interest must be an *estate* in the land.<sup>13</sup> But it does not attach to lands acquired by the

<sup>1</sup> *Murdock v. Steiner*, 9 Wright 349.

<sup>2</sup> *Miles v. O'Hara*, 1 S. & R. 32; *Hawk v. Senseman*, 6 Ibid. 21.

<sup>3</sup> Pamph. L. 127, *Purd. Dig.* 575.

<sup>4</sup> *Mehaffy's Appeal*, 7 W. & S. 200.

<sup>5</sup> Pamph. L. 664, *Purd. Dig.* 575.

<sup>6</sup> Act 16th April 1845, Pamph. L. 542.

<sup>7</sup> Act 23d March 1849, Pamph. L. 218.

<sup>8</sup> Act 5th February 1850, Pamph. L. 44.

<sup>9</sup> Act 18th March 1852, Pamph. L. 149.

<sup>10</sup> Act 21st April 1852, Pamph. L. 389.

<sup>11</sup> 2 Wheat. 396.

<sup>12</sup> *Carkhuff v. Anderson*, 3 Binn. 4; *Richter v. Selin*, 8 S. & R. 440; *Semple v. Mown*, 17 Leg. Int. (1860) 213. 4 Phila. Rep. 85, s. c.

<sup>13</sup> Per GIBSON, C. J., *Morrow v. Brenizer*, 2 Rawle 188. See *Share v. Lyle*, 16 S. & R. 9; *Chahoon v. Hollenback*, Ibid. 425; *Andrews v. Lee*, 3 Pa. R. 101; *Slater's Appeal*, 4 Casey 169; *Raffensberger v. Cullison*, Ibid. 426; *Semple v. Mown*, 4 Phila. Rep. 85. A judgment against a municipal corporation is not a lien upon its real estate: *Schaffer v. Cadwallader*, 12 Casey 126.



defendant after judgment and aliened *bonâ fide* before execution.<sup>1</sup> This latter doctrine, it is believed, could not be supported upon the principles of the common law, but rests solely on a supposed general understanding, and a silent practice prevailing in this State; and though the question is at rest, the rule, being considered an innovation on the law rather than an improvement, is confined most strictly to the point decided, and to the circumstances under which it was established.<sup>2</sup> It has been therefore held, that a judgment binds land, for the sale of which articles of agreement have been entered into *before*, but which have not been conveyed until after judgment.<sup>3</sup> And the revival of a judgment by *scire facias post annum et diem* creates a lien on real property of the defendant acquired after the entry of the original judgment.<sup>4</sup>

A judgment against the equitable estate, which a vendee holds under articles of agreement for the sale and purchase of land, attaches to and binds the legal estate the instant it vests in the vendee. And there is no difference in this respect between a judgment in favor of the vendor and one in favor of a stranger.<sup>5</sup> This doctrine is an exception to the general rule established in Pennsylvania, that the lien of a judgment does not affect a subsequently-acquired interest of the debtor without revival.<sup>6</sup>

The interest of an assignor in the estate, which remains unconverted in the hands of his assignee after the satisfaction of the debts, is bound by the liens of judgments against him, and is the subject of levy and sale.<sup>7</sup> But a judgment against a purchaser, under an order of sale directed by the Orphans' Court, who has failed to comply with the terms of sale, does not bind the premises as a lien.<sup>8</sup>

Under this head, it is not intended to consider fully what interest a judgment binds, or the extent and duration of the lien. The authorities on these points will be found collected elsewhere.<sup>9</sup> The present object is to touch particularly on those decisions which concern the practical duties of counsel in perfecting judgment.

By the third section of the Act of 1772, it is enacted that such judgments, as against purchasers *bonâ fide* for valuable consideration of lands, tenements, or hereditaments, to be charged thereby, shall, in consideration of law, be judgments only from such time as they shall be so signed, and shall not relate to the first day of the term whereof they are entered, or the day of return of the original or filing of the bail, any law, usage, or course of any court to the contrary notwithstanding.<sup>10</sup>

<sup>1</sup> Rundle v. Ettwein, 2 Yeates 23; Colhoun v. Snider, 6 Binn. 135; Case of John Vanderender, 2 Browne 304; Abbott v. Remington, 4 Phila. Rep. 34. The judgment against an equitable vendee must be regarded an exception from the general principle that limits judgment-liens to such estate as the debtor had at the date of this entry. But notwithstanding the dissatisfaction expressed with the doctrine of Colhoun v. Snider, it is too

firmly rooted in our law to be shaken at this day. Per WOODWARD, J., Waters's Appeal, 11 Casey 524.

<sup>2</sup> Richter v. Selin, 8 S. & R. 440.

<sup>3</sup> Ibid.

<sup>4</sup> Clippinger v. Miller, 1 Pa. R. 64.

<sup>5</sup> Waters's Appeal, 11 Casey 523.

<sup>6</sup> Ibid.

<sup>7</sup> Webb v. Dean, 9 Harris 29.

<sup>8</sup> Jacobs's Appeal, 11 Ibid. 477.

<sup>9</sup> Wh. Dig. "Judgment," 4, 5.

<sup>10</sup> 1 Sm. Laws 390.

It would appear that this provision, originally copied from the fifteenth section of the statute of Charles, is merely intended for the protection of *bonâ fide* purchasers, and not to prevent the technical relation of the judgment to the first day of the term in a contest between the judgment-creditor and the plaintiff in a domestic attachment. And it has been decided that, in such a case, the judgment does relate back to the first day of the term, so as to exclude a domestic attachment.<sup>1</sup> As between conflicting creditors, the priority of their judgments is governed by the times of their entry, and not by relation to the preceding term; the uniform, uninterrupted practice in Pennsylvania has been, to consider the binding effect of judgments upon lands, to take place only from the *actual entry* of the judgments, and thus entered, they have never been supposed liable to be affected by fictions or relations.<sup>2</sup> Between judgments entered on the same day there is no priority, and, therefore, the proceeds of sale under them are divided *pro rata*.<sup>3</sup> In regard to the entry of judgments and their priority of lien, a day is not susceptible of judicial division; therefore, it gives one no priority that his judgment appears to have been entered at an hour earlier than the others; consequently, they must be paid *pro rata*, if the fund is insufficient.<sup>4</sup>

And it makes no difference that the prothonotary has made an entry of the hour of entering judgment in each case.<sup>5</sup> Whether the judgment-docket be a part of the record or not, it is *primâ facie* evidence of the order in which liens are entered.<sup>6</sup> It is competent for the prothonotary to receive and file a warrant of attorney at his residence after office hours, and to enter judgment thereon.<sup>7</sup> And if such judgment be docketed the next day as of the day when filed, it becomes a lien as of that date.<sup>8</sup>

But, where two judgments have been entered on the same day, in different counties, by virtue of the same warrant of attorney, evidence is admissible of the exact time at which the first was entered; and, for this purpose, an entry on the docket, made in pursuance of instructions from the plaintiff, is competent evidence.<sup>9</sup>

Though, as between two judgments entered on the same day, *parol* evidence is inadmissible to show that one was taken before the other; yet the principle is different when a conveyance and a judgment conflict, in which case evidence *in pais* is receivable, to show that, though both bear date on the same day, one was in point of time prior to the other.<sup>10</sup> If a subsequent encumbrance,<sup>11</sup> have *actual* notice of a judgment so defectively entered, before his rights attach, it is equivalent to the constructive notice required to be given by entry on the judgment-docket.

In the distribution of the proceeds of sheriff's sale of the real estate of George P. Yost, a judgment entered against him in the name of West is not entitled to come in as against subsequent liens,

<sup>1</sup> Hooton v. Will, 1 Dallas 450.

<sup>2</sup> Welch v. Murray, 4 Yeates 201.

<sup>3</sup> Emerick v. Garwood, 1 Broome 20;

Dupont v. Pichon, 4 Dallas 321, in note.

<sup>4</sup> Metzler v. Kilgore, 3 Pa. R. 245, and ante, p. 625, note (1).

<sup>5</sup> Ibid.

<sup>6</sup> Polhemus's Appeal, 8 Casey 328.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Neff v. Barr, 14 S. & R. 166.

<sup>10</sup> Mechanics' Bank v. Gorman, 8 W. & S. 304.

<sup>11</sup> York Bank's Appeal, 12 Casey 458.

properly entered, though the names have the same sound in the German language; for the law requires that the dockets and indexes shall be kept in the English language, and does not impose the duty on searchers of inquiring, whether other letters in another language may not spell the name of the debtor. It was the duty of the holders of that judgment to see that it was entered, so as to furnish to the eye of purchasers and subsequent encumbrancers that record-notice which the Act of Assembly requires; and it being entered in the wrong initial, it was not notice to subsequent judgment-creditors, and was not therefore entitled to share in the fund.<sup>1</sup>

Where a mortgage is contestant with a judgment, the principle which rejects fractions of a day applies. A mortgage as between creditors is to be considered an encumbrance, and, therefore, it is not entitled to the privilege of a conveyance in a contest with a judgment, in which fractions are admitted.<sup>2</sup>

It seems that the principle of "*idem sonans*," though in general applicable to names similarly pronounced, does not apply to judgments against a defendant entered in different initials from the usual and ordinary form in which the name was written and spelled in the English language, though the pronunciation of the different names be the same.<sup>3</sup>

When the vendee receives a deed, and at the same time gives a mortgage for the purchase-money, a judgment entered against him binds his entire interest; and, if the mortgage be not placed in the proper office, to be recorded within the time prescribed by the statute, the judgment will take precedence of it.<sup>4</sup>

Where a court opens a judgment, and lets the party into a defence, the lien of the judgment, from the date of the original entry, is not thereby impaired.<sup>5</sup> A levy on personal property under a *fiery facias*, if the goods are left in the debtor's hands, does not postpone the lien of the judgment upon his lands to that of a junior judgment-creditor.<sup>6</sup>

Judgments against an equitable estate in land rank, like others, according to dates.<sup>7</sup>

A judgment for arrears of ground-rent, like a judgment against an administrator, creates no new lien. The lien of a ground-rent is not limited by any positive enactment.<sup>8</sup>

In order to give a judgment for purchase-money any peculiar merit, it must be entered at the same time the deed is delivered, or so near it as to constitute it one transaction. Otherwise, it will have no precedence of liens on the equitable estate held by the defendant under articles, or on the subsequently-acquired legal estate.<sup>9</sup>

The lien of judgments against the vendee of land, entered before the conveyance of the legal title, is extended to the whole estate in the premises on the union of the legal and equitable title effected by the conveyance of the latter.

<sup>1</sup> Heil & Lauer's Appeal, 4 Wright 453.

<sup>2</sup> Claason's Appeal, 10 Harris 359; s. c., Clawson v. Eichbaum, 2 Grant's Cases 130; Hendrickson's Appeal, 12 Harris 363.

<sup>3</sup> Heil & Lauer's Appeal, 4 Wright 453.

<sup>4</sup> Foster's Appeal, 3 Barr 79.

<sup>5</sup> Steinbridge's Appeal, 1 Pa. R. 481.

<sup>6</sup> Campbell, Bredin & Co.'s Appeal,

8 Casey 88.

<sup>7</sup> Wilson v. Stoxe, 10 Watts 434.

<sup>8</sup> Wills v. Gibson, 7 Barr 156.

<sup>9</sup> Lyon v. McGuffy, 4 Barr 126.

A judgment against the vendee, entered several days after the delivery of the conveyance, though confessed for money used in paying a portion of the purchase-money of the land, is not entitled to payment in preference to prior judgments against him, entered after the purchase of the premises but before the conveyance of the legal title. A mortgage for the residue of purchase-money of land, executed at the time of the delivery of the conveyance of the legal title and duly recorded, has priority of lien, on the land conveyed, over judgments against the vendee, entered after the purchase of the land and before the conveyance.<sup>1</sup>

In relation to the distribution of the proceeds of sheriffs' sales between judgment and lien creditors, it has been held that *contract*-creditors, who have acquired no judgments or liens, are strangers to questions of distribution, and are not entitled to be heard in reference to them.<sup>2</sup>

A judgment entered after the recording of a mortgage for purchase-money, acquires no priority over the mortgage by reason of its being entered before the judgment on the bond or notes secured by the mortgage.<sup>3</sup>

In distributing the proceeds of real estate raised by a sheriff's sale, judgment-creditors are entitled to all the debtors' equity against any of the claimants. If the debt or lien is not a subsisting one against the property before the sale, it cannot interfere with the fund raised by the sale: therefore, where a person sells land and agrees to make a title free from encumbrances, he cannot afterwards purchase an outstanding lien against it, and enforce it against his vendees, or have it paid out of the proceeds of sheriff's sale of the premises, as against the equities of the judgment-creditors of the vendees.<sup>4</sup>

A judgment entered on the day on which the defendant's land is sold by the sheriff on an execution, is a lien on his land at the time of the sale, although entered at a later hour of the day than the sale, and is entitled to share in the proceeds, if they be sufficient.<sup>5</sup>

A mortgage other than one given to secure the purchase-money of the mortgaged premises, recorded on the same day that a judgment is entered against the mortgagor, is not "prior to all other liens on the same property," and is divested by a sale of the premises under proceedings upon a subsequent judgment.<sup>6</sup>

A vendor of land has a lien for the purchase-money by virtue of his title only up to the time of conveyance; afterwards he has no lien except it be created by judgment or mortgage. Under the Amicable Arbitration Law of 1836, an award has no greater effect than the verdict of a jury until judgment absolute be entered upon it. Unless judgment absolute be entered on the lien-docket, it cannot be continued by *scire facias* as against subsequent judgment-creditors without actual notice.<sup>7</sup>

Where a vendee of land under articles, commenced to build a saw-mill, and afterwards received a deed for the land, giving a judg-

<sup>1</sup> Cake's Appeal, 11 Harris 186.

<sup>2</sup> Smith v. Reiff, 8 Ibid. 364.

<sup>3</sup> Larimer's Appeal, 10 Ibid. 41.

<sup>4</sup> Dentler's Appeal, 11 Ibid. 505.

<sup>5</sup> Small's Appeal, 12 Ibid. 398.

<sup>6</sup> Magaw v. Garrett, 1 Casey 319.

<sup>7</sup> Stephens's Executors' Appeal, 2 Wright 9.

ment for the unpaid purchase-money, which was entered on the same day: *Held*, that the lien of the purchase-money judgment had priority over a mechanics' lien filed for materials furnished for the mill, and was entitled to be first paid out of the proceeds of the sale of the land under execution.<sup>1</sup>

Where the Christian names of the partners of a firm who had given a judgment signed with the firm name, were not set out upon the judgment-docket; on entry of the judgment it was *held* without effect, as a lien against subsequent purchasers and lien-creditors without notice. Actual notice of the judgment would have supplied the defective or omitted index of the registry; but to be of actual service to the subsequent encumbrancer, he must be personally informed of the specific prior lien before his rights as a lien-creditor attached: notice to his counsel is not sufficient.<sup>2</sup>

When transcripts of judgments obtained before a magistrate are filed in the prothonotary's office of the Court of Common Pleas, they become liens on lands, and are on a footing with judgments in courts of record, by virtue of the Act of March 1810, § 10.<sup>3</sup> They are in effect judgments of the Court of Common Pleas, and may be so called in a writ of *scire facias* to revive them.<sup>4</sup> The five years within which a *scire facias* should issue to preserve this lien must be computed from the first day of the term to which it is entered, and not from the actual date of the entry.<sup>5</sup> Since the Act of 24th March 1837, nothing will avail to continue the lien of a judgment beyond five years, except an amicable revival or the issuing of a *scire facias* within that period.<sup>6</sup> The court has no authority to strike off such judgments from the docket, or to take any cognisance of the judgments thus entered for the purpose of reserving them, unless brought before it by appeal or *certiorari*.<sup>7</sup> As regards real estate, it is virtually a judgment of that court,<sup>8</sup> consequently it may be set aside on motion with or without an issue, where it has been obtained surreptitiously, or it may be only opened to let the party into a defence, when he has missed his time by accident or mistake; a practice extremely beneficial, and founded on the chancery powers which our courts are in the daily habit of exercising. The matters, however, which constitute the defendant's title to relief, must have existed previous to or at the time of rendering judgment. If they be subsequent, the court will not interfere in a summary way further than to stay the execution, because they may be pleaded to a *scire facias*, which, if it be necessary, the plaintiff will be ordered to bring.<sup>9</sup> In this action the validity of the judgment ought, it seems, to be questioned upon the plea of *nul tiel record*, where the amount of the judgment exceeds the magistrate's jurisdiction. But when such a transcript is filed, the proper remedy is, a motion to strike it off, or, perhaps, a writ of error. It cannot be treated as a nullity;<sup>10</sup>

<sup>1</sup> *Stoner v. Neff*, 14 *Ibid.* 258.

<sup>2</sup> *Smith's Appeal*, 11 *Ibid.* 128.

<sup>3</sup> 5 *Sm. Laws* 161.

<sup>4</sup> *Walker v. Lyon*, 3 *Pa. R.* 98.

<sup>5</sup> *Betz's Appeal*, 1 *Ibid.* 271.

<sup>6</sup> *Gloninger v. Hazard*, 4 *Phila. Rep.*

<sup>7</sup> *Dailey v. Gifford*, 12 *S. & R.* 72.  
see *O'Donnel v. Seybert*, 13 *Ibid.* 57.

<sup>8</sup> *sed vide Walker v. Lyon*, 3 *Pa. R.* 98.

<sup>9</sup> *Brannan v. Kelley*, 8 *S. & R.* 479.

<sup>10</sup> *King v. King*, 1 *Pa. R.* 20.

<sup>11</sup> *Walker v. Lyon*, 3 *Ibid.* 98.

a transcript, however, creates no lien on defendant's real estate, if an appeal has been duly entered before the alderman.<sup>1</sup>

A judgment rendered in the Supreme Court is a lien on the lands of the defendant situated in the county in which the same was rendered.<sup>2</sup> The lien of a judgment in the Circuit Court of the United States, extends over the entire circuit, and binds lands situated in any part of it.<sup>3</sup>

On a *scire facias* to revive and continue the lien of a judgment on real estate, no one but he who is terre-tenant can plead that the land is discharged from the lien of the original judgment. Where the *scire facias* issues against the defendant in the judgment, with notice to terre-tenants generally without naming any one, a party desirous of pleading discharge of the lien must prove that he is terre-tenant; but where one is named as terre-tenant in the writ, proof on his part that he purchased from the original defendant after rendition of the judgment is unnecessary. The mere suing out of a writ of *sci. fa.* is effectual to continue the lien of a judgment for a period of five years, provided it be duly prosecuted: the plaintiff has five years' time in which to obtain his judgment of revival.<sup>4</sup>

A judgment was entered on the 23d of January 1854; a *sci. fa.* to revive issued August 16th 1855, and served on the terre-tenants (who were named) but returned "*nihil*" as to defendant; and on the 7th of April 1858 an *alias sci. fa.* was sued out, which was served and returned as before: *Held*, that the *alias sci. fa.* was not an abandonment but a prosecution of the first *sci. fa.*, and that the land was bound by the lien of the original judgment.<sup>5</sup>

A judgment entered on a bond and warrant of attorney, with a stipulation that its lien shall be restricted to certain specified real estate, and subsequently revived generally, by confession after the expiration of five years from the entry of the original judgment, is without limitation or restriction as to its lien on the defendant's real estate.<sup>6</sup>

A stipulation in a bond and warrant of attorney, that the judgment to be entered thereon shall be a lien only on certain designated lands, though it restricts the lien of the judgment, does not exempt the other real and personal property of the defendant from liability for the debt.<sup>7</sup> The lien is but an incident to the judgment, and a restriction of it to certain designated lands does not affect the judgment as a personal security.<sup>8</sup>

By a judicial sale *all liens* then existing, which are by law payable out of the money produced by the sale, are discharged.<sup>9</sup> By a judicial sale, the price, as *money*, becomes to all intents and purposes the substitute and representative of the *land*.<sup>10</sup>

Though the lien-docket is the usual notice of existing liens of judgments and awards, and the only docket to be examined, yet actual notice of a lien independently of it may be effective. After

<sup>1</sup> *Hastings v. Lolough*, 7 Watts 540.

<sup>2</sup> Act of March 1779, 3 Sm. Laws 358, § 14, *Purd. Dig.* 462.

<sup>3</sup> *In re McGill*, 6 Barr 505; 1 Wall, Jr. 196.

<sup>4</sup> *Silverthorn v. Townsend*, 1 Wright 263.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Dean's Appeal*, 11 Casey 405.

<sup>7</sup> *Stanton v. White*, 8 Casey 358.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Abbott v. Remington*, 4 Phila. Rep.

34.

<sup>10</sup> *Ibid.*

the lien of a judgment is gone, a seizure and extent of land on an execution upon it will not continue the lien, though made while it existed between the parties to it.<sup>1</sup> A judgment is a lien according to the title which the defendant holds: if he has no title when it is entered, it is no lien.<sup>2</sup>

A judgment limited "to be a lien" only upon certain real estate, is not satisfied by a sheriff's sale of the property to which its lien is restricted. An unconditional revival of a restricted judgment during defendant's lifetime, makes it a general lien on all his lands in the county; but such revival after his death, against his personal representatives only, simply continues the lien as originally restricted. To encumber his other real estate with the judgment, as against the widow and heirs, proceedings must be had against them under the provisions of the 34th section of the Act of 24th February 1834.<sup>3</sup>

A judgment entered after the passage of the Act of 1849, exempting \$300 of property from levy and sale, and before the Act of 26th April 1850, is entitled to priority on the real estate over the claim of the widow of the defendant under the latter act. Such a judgment is a lien on the real estate of the defendant, although the entire value of his estate, real and personal, was less than \$300. The lien is subject to the defendant's statutory right, but is unaffected by it until he claims its benefit.<sup>4</sup>

By the Act of April 11th 1862,<sup>5</sup> it is provided, that a *scire facias* may issue to continue the lien of judgments against any person who has been or may be mustered into the service of this State, or of the United States, and that the issuing of such writ shall continue the lien of the judgment; but judgment of revival shall not be entered while the defendant is in actual service; but such entry of judgment after discharge from service, shall only be made upon ten days' notice to the defendant, who shall have the right to appear and take defence. And by section 2 it is provided, that if within three months after the expiration of the term of service or discharge, the defendant shall not return to the county in which such judgment is entered, the plaintiff may issue an *alias scire facias*, and upon *nihil* return thereon judgment of revival shall be entered.

### SECTION III.

#### JUDGMENT AGAINST DECEASED PERSON.

By statute 17 C. 2, c. 8 (made perpetual by 1 J. 2, c. 17, § 5, and reported to be in force in Pennsylvania),<sup>6</sup> where either party dies between the verdict and judgment, "in any action personal, real, or mixed," his death shall not be alleged for error, so that the judgment be entered within two terms after verdict. Under this statute it has been held in England, that the death of either party *before* the assizes is not remedied; but if he die *after* their com-

<sup>1</sup> Stephens's Executors' Appeal, 2 Wright 9.

<sup>2</sup> Beekman's Appeal, Ibid. 385.

<sup>3</sup> McMurray's Administrators v. Hopper, 7 Ibid. 408.

<sup>4</sup> Becker's Appeal, 3 Casey 52.

<sup>5</sup> Sect. 1, Pamph. L. 484, Purd. Dig. 1277.

<sup>6</sup> Rob. Dig. 369.

nencement, although *before the trial*, that is within the remedy of the statute; for it is a remedial act, and shall be construed favorably; the assizes being considered as but one day.<sup>1</sup> And even at common law, if either party die after special verdict and pending the argument, motion for a new trial or other proceeding, whereby entry of judgment is suspended, judgment may be entered *nunc pro tunc* as of the term when the party would have been entitled to it on the return of the *postea*,<sup>2</sup> that the act, arising from the delay of the court, may not turn to the prejudice of the party. In the case of *Griffith v. Ogle et al.*,<sup>3</sup> the plaintiff having died after verdict, judgment was entered as of a term when he was living, and on an appeal this proceeding was sustained. And said Tilghman, C. J., "direct authorities have been cited by the plaintiff's counsel in support of this practice. It tends much to the attainment of justice, and we have no doubt but it is perfectly regular." Independently of the statute, the court has power to enter judgment at their discretion, as of a past time, when it ought to have been entered in order to do justice, without injury to third persons. Where, therefore, upon *nul tiel record* pleaded, the court decided that there was such a record, but the prothonotary omitted to enter judgment, and after this decision the defendant died, it was held that the court, in order to do justice, might enter judgment after his death, as of the time when it ought to have been entered, although nearly eight years had elapsed between the determination of the issue and the actual entry of the judgment. The rights of third persons will, however, be protected against any consequences which might result from the entry of the judgment as of a *past time*.<sup>4</sup> So it was held that an agreement to enter judgment as of a particular term, is complied with by an entry of judgment as of a subsequent term, provided no third person is injured thereby. At all events, a judgment erroneously entered cannot be said to be void, upon a collateral examination. It is valid until reversed.<sup>5</sup> If the plaintiff die after the verdict for the defendant, and the latter do not enter up judgment within two terms after the verdict, the court has no authority to permit it to be entered afterwards *nunc pro tunc*.<sup>6</sup>

Although, at common law, the judgment being personal survives, when one of the several defendants dies, as to the personalty, yet it does not survive as to the real estate bound by it. It does not lie wholly on the survivor, but the lands of all are equally chargeable, and execution must be equally made; and if one dies, the creditor must bring a *sci. fa.* against his heirs and terre-tenants, and also against the survivors. But it is otherwise where the lands are not bound; as if two enter into a bond, and one dies before judgment, the survivor shall be charged alone.<sup>7</sup> The lien of a judgment, though not revived by *scire facias* within five years, continues against the lands of the debtor in the hands of his heirs or devisees, and is entitled to priority of payment over the general creditors of the

<sup>1</sup> 2 Tidd 847.

<sup>2</sup> 1 Johns. Cases 410; Bingham on Judgment 95.

<sup>3</sup> *Griffith v. Ogle*, 1 Binn. 172.

<sup>4</sup> *Murray v. Cooper*, 6 S. & R. 126.

<sup>5</sup> *Lewis v. Smith*, 2 Ibid. 142.

<sup>6</sup> *Cohley v. Day*, 4 Taunt. 702.

<sup>7</sup> See *Stiles v. Brock*, 1 Barr 216.



debtor who had not obtained judgments against him in his lifetime.<sup>1</sup> The Act of 4th April 1793 restrained the lien of a judgment to a period of five years, only in favor of purchasers from the debtor and judgment-creditors in his lifetime, but left it without limit against every one else.<sup>2</sup>

A testator having appointed his two daughters and a son executors, died in December 1794: after the death of his son, a son-in-law, in November 1801, to recover a debt due him by testator, commenced an action against the surviving executors, one of them being his wife upon whom only process was served, and who by attorney appeared (the other daughter and her husband who were also sued not appearing) and confessed judgment in December 1801 for the plaintiff: on this judgment a *scire facias* issued in 1803 against the same parties originally sued, reciting a judgment against both daughters, executors, to which the one not before served appeared, and final judgment was entered in 1808, upon which a *testatum fieri facias* issued, and land of the decedent's was sold by the sheriff and deed acknowledged, under which, in an ejectment therefor, the plaintiffs claimed. *Held*, that as the original judgment in 1801 was void, the revival by *scire facias* must be treated as a new judgment; and though the original action was in time to save the debt from the bar of the statute of 19th April 1794, limiting the lien of the debts of a decedent to seven years from his death, it was not properly pursued, the process as against the other daughter, executor, not commencing effectively until she appeared to the *scire facias* in 1803, when the lien of the debt sued for had expired. Hence the judgment on the *scire facias* did not continue the charge of the debt against the testator's lands, and the sale on the *testatum fieri facias* thereon passed no title.<sup>3</sup>

By the practice of this State, the creditor of a decedent may enter judgment and issue execution after the death of his debtor; and as between the plaintiff and the representatives of the decedent, the execution is considered as relating back to the first day of the term.<sup>4</sup>

But the plaintiff, in such execution, gains no priority thereby over other creditors, and is entitled to no more than is given to him by the Intestate Act.<sup>5</sup> There are two sections of the Act of 24th February 1834 that relate to the practice with regard to executions issued upon judgments obtained against decedents and their estates; and they are important to be kept in mind by the practitioner. The one is the 33d section, and the other the 34th section.<sup>6</sup> The first requires the plaintiff, in any judgment obtained against a decedent in his lifetime, before proceeding to issue execution for the levy or sale of any real or personal estate of such decedent, to proceed by *scire facias* against his personal representatives, to show cause why the execution should not issue; and this step is

<sup>1</sup> Aurand's Appeal, 10 Casey 151.

<sup>2</sup> Ibid.

<sup>3</sup> Buehler's Heirs v. Buffington, 7 Wright 279.

<sup>4</sup> Leiper v. Levis, 15 S. & R. 108.

<sup>5</sup> Ibid. McMillan v. Red, 4 W. & S.

237; Bosler v. Exchange Bank, 4 Barr

34. See for the manner of collecting claims against a decedent's estate, Vol. II. "Executors," and Whart. Digest, "Decedent," III.

<sup>6</sup> Pamph. L. 78, 80. Purd. Dig. 288.

necessary in a case where the *teste* of the writ bears date antecedently to the date of the decedent's death. The other section to which we refer requires the widow and heirs or devisees, and the guardians of such as are minors, to be made parties to a judgment obtained against the personal representatives of a decedent where the plaintiff intends to charge the real estate of the decedent with the payment of the judgment. The object of the framers of the act was to protect the estates of dead men from collusive judgments obtained by pretended creditors against faithless representatives.<sup>1</sup> The section does not apply to judgments obtained in the lifetime of the decedent.<sup>2</sup> But wherever a title derived through a judgment against the personal representatives has been set up to defeat the heirs or devisees of a decedent, it has been required to conform to the statutory rule.<sup>3</sup> If land is sold on a judgment obtained against an administrator in a suit originally brought against the debtor who died before judgment, the sale is void as to heirs and devisees, though not so as to strangers and intruders.<sup>4</sup> The heirs and devisees who are made parties to the *scire facias* issued upon such a judgment, are not precluded by the judgment, but may contest it. The judgment, however, is conclusive where the executor is the sole devisee of the real estate.<sup>5</sup> A judgment rendered against a person after his death is reversible if the fact and time of death appear on the record, or in error *coram nobis* if the fact must be shown *aliunde*; it is voidable, not void, and cannot be impeached collaterally: still less is a decree *in rem*, as an order of sale, to be held void or impeached collaterally when made after the death of the owner of the property.<sup>6</sup> The sale of the real estate of a decedent by his executor for the payment of debts under a power contained in the will does not divest the lien of a judgment entered in the lifetime of the testator. And a sale by an executor, under a testamentary power, is not a *judicial sale*.<sup>7</sup>

#### SECTION IV.

##### JOINT JUDGMENT.

A judgment against one partner in a suit against two, without any service or return of *nihil habet*, &c., against the other, is erroneous; but a *bonâ fide* payment of such judgment by the sheriff, out of proceeds of land sold by him, on which it was a lien, is a protection to the sheriff in an action brought against him by the judgment-debtor, or his subsequent judgment-creditors, after a reversal of the judgment.<sup>8</sup> A judgment confessed by one partner in the name of the firm, though void as to his copartners, is good as between him and the creditor not only as evidence of the amount

<sup>1</sup> *Christman's Executors v. Evans's Administrator*, 13 S. & R. 14.

<sup>2</sup> *Brobst v. Bright*, 8 Watts 124.

<sup>3</sup> *Keenan v. Gibson*, 9 Barr 249; *McCracken v. Roberts*, 7 Harris 393.

<sup>4</sup> *Riland v. Eckert*, 11 Harris 215.

<sup>5</sup> *Stewart v. Montgomery*, *Ibid.* 410.

<sup>6</sup> *Yaple v. Titus*, 5 Wright 195.

<sup>7</sup> *Fisher v. Kurtz*, 4 Casey 47.

<sup>8</sup> *Commonwealth v. Rogers*, S. Ct. Penn., 1 Am. L. J. 208; *Bright v. R.* 109.

of his indebtedness, but as a lien upon his real estate within the county.<sup>1</sup> A judgment against a firm entered on the judgment-docket without setting forth the Christian names of the several partners is without effect as a lien, so far as respects subsequent purchasers and encumbrancers. But as between the parties, the entry upon the judgment-docket is not necessary to create a lien upon the defendant's real estate. The only effect of a defective entry is a failure to give notice to subsequent purchasers and encumbrancers.<sup>2</sup>

In *assumpsit* against several, if some are served and appear and plead to issue, and some make default, plaintiff takes judgment against the latter; and under the 27th section of the Act of 1722, the jury which tries the issue against the former may assess damages against all, and execution issues against all.<sup>3</sup>

In an action on joint contract the plaintiff should be careful not to sever the joint action by proceeding against them separately. He has his election, either to wait till all the defendants come in, and then proceed to joint judgment, or, if he believes either of them sufficient, to seek the recovery of his demand by a proceeding against that one. But if he adopt the latter course, taking a judgment from one for a sum certain, and the other defendant pleads, goes on to trial, and a verdict passes against him, the plaintiff cannot obtain judgment on such verdict; his only recourse is to the judgment confessed, which remains good;<sup>4</sup> but in such a case the *defendant* is not entitled to judgment.<sup>5</sup> So where two defendants in an action of trespass against six, pleaded to issue, and judgment was signed against the others for want of a plea, and on the trial, damages were assessed against the two who pleaded, and judgment was entered on the verdict, it was considered as a separation of the defendants, and the verdict as equivalent to a formal entry of *nolle prosequi* as to the others, and the judgment against all, but the two who joined issue, was held erroneous.<sup>6</sup> In such cases the course is, after taking judgment by default against those defendants who do not plead, to issue a *venire*, as well to try the issue with those who have pleaded, as to assess the damages against *all* the defendants: and in order to fix the defaulters, the *venire* must so issue, and the jury must so be sworn.<sup>7</sup> In a suit upon such an obligation as a recognisance taken in the Orphans' Court, where the action is brought in the name of the Commonwealth to the use of those in interest, the judgment will not be for the penalty, but for the precise sum due to the named *cestui que trusts*.<sup>8</sup>

There are instances in which there may be distinct judgments on the same record. If the court see two separate causes of action in the same record, on one of which the plaintiff succeeds, and the other

<sup>1</sup> York Bank's Appeal, 12 Casey 458.

<sup>2</sup> Ibid.

<sup>3</sup> Ridgely v. Dobson, 3 W. & S. 118. See, as to opening joint judgment, *post*, 651.

<sup>4</sup> Williams v. McFall, 2 S. & R. 280.

<sup>5</sup> See *ante*, 450; and see Vol. II. "Partners," and Wh. Dig. "Debtor,"

I., III., where the cases concerning the merger of a simple contract debt into a judgment, are considered.

<sup>6</sup> Cridland v. Floyd, 6 S. & R. 412.

<sup>7</sup> *Per curiam*, Ibid. 416; *vide ante*, 411.

<sup>8</sup> Kidd v. The Commonwealth, 4 Harris 426.

is found for the defendant, they are bound to give distinct judgments.<sup>1</sup> So, in an action for an assault and battery against two defendants, if one suffer judgment by default, and the other justify and obtain a verdict, there must be two separate judgments on the record.<sup>2</sup> But where an action is brought on a joint contract against two, and one has suffered a default, and the other obtains a verdict, it is held that judgment must be entered up for both defendants.<sup>3</sup>

There would appear to be no case in which a court would render judgment on a verdict for damages payable by instalments. Even on *debt* for a penalty, the judgment is for the whole penalty as a *personal* debt, although the court having a control over the execution, permits the instalments to be recovered separately as they fall due.<sup>4</sup>

Where, in a default, suffered by one of two defendants in an action on a penal bond, the interlocutory form of judgment is made to assume, erroneously, a definite one, by adding the amount of the penalty, instead of assessing damages, the court will strike off this inadvertent addition, or the Supreme Court, on error, will treat it as a nullity, as they did in *O'Neal v. O'Neal*, an administrator's confession of judgment *de bonis*, where no confession of assets was intended.<sup>5</sup> The court distinguished this case from that of *Williams v. McFall*,<sup>6</sup> where the first judgment was not, as here, inadvertently made final, but was a regular confession of judgment by one, and an attempt, after execution, to obtain another judgment against a co-defendant in the same action, which the court would not allow.

Where one of two defendants is in default, judgment must be signed against him, in order to proceed against the other. This is so where the default is after return of two *nihilis* to a *sci. fa* as to one, and appearances on both writs for the other defendant.<sup>7</sup>

To assess damages is the exclusive business of the jury, who, if they assess them conditionally, should also render them conditionally. It is not competent to the court to instruct the jury to find damages sufficient to insure a specific execution of a contract, and that the court will control the plaintiff in the use of the verdict; they may be instructed to find the damages conditionally, they prescribing the terms on which they shall be released, and with us this mode of effecting an equitable object is, from necessity, frequently resorted to.<sup>8</sup> In a suit, for example, by the administrator of an *insolvent* estate, the defendant is entitled to credit for the payment by him of a note on which he was liable as surety for the decedent; and in such a suit the defendant is entitled to a *conditional* verdict, permitting him to retain in his hands so much of the amount due by him on the claim in suit as shall be sufficient to satisfy a note in which he is surety for the decedent, until he be exonerated, if the claim for which he is surety is payable.<sup>9</sup>

<sup>1</sup> 3 T. R. 656; 2 Caines's Rep. 218.

<sup>2</sup> 3 T. R. 656.

<sup>3</sup> 3 Day's Rep. 307.

<sup>4</sup> *Per* Gibson, J., *Shoemaker v. Meyer*, 4 S. & R. 452; see § 8, Stat. 8 & 9 W. III., Rob. Dig. 1-2; *ante*, 415.

<sup>5</sup> *O'Neal v. O'Neal*, 4 W. & S. 132.

<sup>6</sup> 2 S. & R. 280.

<sup>7</sup> *Bennet v. Reed*, 10 Watts 396.

<sup>8</sup> *Decamp v. Feay*, 5 S. & R. 328.

<sup>9</sup> *Beaver v. Beaver*, 11 Harris 167.

If in an action of debt the sum found by the verdict does not exceed the sum *in numero* demanded in the writ, the verdict must be taken all in debt; but where the debt and interest exceed that sum, the verdict should be in debt for the whole sum demanded, and in damages for the sum *ultra*.<sup>1</sup> An action for a legacy charged upon real estate should be brought against the executor and terretenants, and the judgment in such case should be entered so as to charge the *land* and *not* the *persons* of the defendants.<sup>2</sup>

## SECTION V.

AMENDMENT OF JUDGMENT.<sup>3</sup>

The judgment is amendable at common law, in substance or in form, at any time during the term of which it is signed, and after that time, even after error brought, and *in nullo est erratum* pleaded.<sup>4</sup> It is amendable for misprision of the clerk, by 8 H. VI. c. 12 & 15, declared to be principally in force in Pennsylvania.<sup>5</sup> Where a judgment *de bonis propriis* was entered against an executor, instead of judgment *de bonis testatoris*, the court ordered it to be amended,<sup>6</sup> even after error brought.<sup>7</sup>

Although after the term is ended at which judgment is entered on a case stated, or verdict, the court cannot alter it so as to correct what, on reconsideration, may be deemed an error; yet they may, before error brought, correct a mere mistake in entering it, such as an entry of judgment for one party, where the other party was in fact intended. Whenever there is anything to correct by, such as the judge's notes, no danger need be apprehended, and it is justified by the general rule on the subject, as well as by the reason of the thing.<sup>8</sup> Even after error brought the record may be amended, if there is anything on it, or filed with it as part of the proceedings, to justify the amendment. If the record is brought up on error, it will be remitted to the court below for the purpose. There are many illustrations of the rule in the reported cases. A judgment, for example, entered against a defendant by a wrong Christian name, may be amended by the bond and warrant of attorney, as between the parties.<sup>9</sup> It may be amended from a less to a greater sum by the paper on file assessing the damages. As between the parties, such an amendment may be made after bail given for a stay of the execution, *ca. sa.* issued and returned, and after an action brought against the bail, a trial had, and writ of error brought; but it cannot be done, if the amendment affect the rights of the bail, or of creditors or purchasers.<sup>10</sup> The limitation of the rule, however, is

<sup>1</sup> Reed v. Pedan, 8 S. & R. 267.<sup>2</sup> Brown v. Furer, 4 Ibid. 213.<sup>3</sup> See *post*, Vol. II., title "Amendment," for general principles, &c., concerning amendment; and see Carskadon v. McGhee, 7 W. & S. 140.<sup>4</sup> 4 M. & S. 94; Barnes 7.<sup>5</sup> Vide Rob. Dig. 29, 33-4, 49.<sup>6</sup> 5 Burr. 2730.<sup>7</sup> 1 T. R. 783; and see 2 Arch. Pr. 243.<sup>8</sup> Stephens v. Cowan, 6 Watts 513.<sup>9</sup> Zimmerman v. Briggans, 5 Ibid. 186.<sup>10</sup> Crutcher v. The Commonwealth, 6 Wh. 349.

disclosed by the principle that the court cannot correct a judicial error after proceedings have been had on the judgment. This principle is found exemplified in the case of *Ullery v. Clark*,<sup>1</sup> in which it was decided that where the court had entered judgment without costs on an award of arbitrators, it could not after two years, during which an exemplification of the record was filed in another county and an execution issued and returned, change the judgment by entering it *with costs*. Such a change as this would be rather judicial than clerical. In accordance with the same doctrine, a judgment entered by mistake, upon a warrant of attorney, for a less amount than the obligation demands, may be amended by the court after execution issued, and an *alias* execution may be awarded for the balance remaining uncollected, if the rights of third persons are not prejudiced by such amendment.<sup>2</sup> The regularity of an amendment by a court of competent jurisdiction cannot be inquired into collaterally.<sup>3</sup>

The Act of 16th June 1836 gives the Supreme Court power to *modify* as well as to reverse and affirm judgments. Under it, the court feel authorized to disregard slips in practice where it is not inconsistent with law and the rights of parties; such, for example, as a general judgment against two, where one had not been served, and had not appeared to the writ, and in which the court reversed the judgment as to him, and affirmed it as to the others.<sup>4</sup> But where a party recovers irregularly a judgment against a defendant, which would have been set aside on application to the court below, the Supreme Court, on failure to make such an application, will regard the regularity of the judgment admitted, in many cases. Thus, where a *scire facias* was issued against the defendant and terre-tenants, and was returned *nihil* as to the defendant and served as to the terre-tenants, and judgment entered generally for want of an appearance, it was held that the irregularity of the judgment against the original defendant was unimportant in the court of errors, as no application to set it aside had been made in the court below.<sup>5</sup> There is a clear distinction between void and voidable judgments. Irregularities that will enable parties to set judgments aside on motion, do not vitiate them utterly, and until they are reversed or set aside by legal proceedings they are binding and conclusive. For example, where a justice rendered judgment against a defendant in a case in which the docket stated that the summons was "returned on oath," but without returning that it had been served, it was held that the judgment in a *scire facias* thereon was to be regarded as conclusive.<sup>6</sup>

The doctrine of amendments appears to be without limitation in Pennsylvania, and has, in modern practice, been applied upon very liberal principles: thus an amendment was permitted in the verdict, in an ejectment, although nothing appeared to amend it by.<sup>7</sup> So, where the verdict exceeded the amount of damages laid in the decla-

<sup>1</sup> 6 Harris 149.

<sup>2</sup> *Smith v. Hood & Co.*, 1 Casey 218.

<sup>3</sup> *Hamilton v. Seitz*, *Ibid.* 226.

<sup>4</sup> *Jamieson v. Pomeroy*, 9 Barr 231.

<sup>5</sup> *James v. Jarrett*, 5 Harris 370.

<sup>6</sup> *Sloan v. McKinstry*, 6 *Ibid.* 120.

<sup>7</sup> *Scott v. Galbraith*, cited *Burrows v. Heysham*, 1 Dallas 134.

ration, a *remittitur* for the excess was permitted, although after error brought, and judgment was entered for the residue.<sup>1</sup> If, however, the record be removed by writ of error, the Supreme Court will not suffer a *remittitur* of the surplus damages to be entered, but will send back the record to the court below for amendment, if they think proper to amend. This objection being removed, and the amended record returned, the judgment will be affirmed.<sup>2</sup> And where a plaintiff obtained a verdict, and the judges being equally divided on a motion for a new trial, the clerk entered judgment on the order of one of the judges, but objected to by the other: the judgment was held good, the court presuming that the dissenting judge merely wished his opinion against the verdict to be entered of record, and not to arrest the course of law.<sup>3</sup> Where one defendant died after suit brought, and judgment was entered against both, an amendment was permitted by entering a suggestion of his death, with the same effect as if entered before judgment, though after error *coram vobis* upon which his death before judgment had been assigned; and per Tilghman, C. J.: "The cases cited in support of the motion are sufficient to show the power of the court, and it is a power which, generally speaking, tends very much to the promotion of justice; the court feel themselves bound to adopt amendments of this nature, as far as is consistent with their lawful authority, nor will they be disposed to fetter them with conditions except in extraordinary cases."<sup>4</sup> The court will not presume anything against judgments, and do not incline to set them aside unless for manifest error;<sup>5</sup> and whilst they remain in full force and unreversed, the court cannot *collaterally* in a new action brought against a different defendant, declare them to be illegal and of no effect.<sup>6</sup>

When an executor or administrator has rendered himself liable by pleading a matter which would be a perpetual bar, which lies within his own knowledge, and is false, the judgment is entered *de bonis testatoris si, &c., et si non, de bonis propriis*; as if he pleads *ne unques executor*, or that he *renounced*, and *nulla bona devenerunt ad manus*; and upon a judgment thus obtained, where an executor so charges himself, though the first execution must be *de bonis testatoris*, yet the sheriff cannot return *nulla bona testatoris*, simply, but must also return a *devastavit*.<sup>7</sup> If the defendant pleads *administravit*, plaintiff may pray judgment *quando acciderint*; but if he takes issue on the plea, and it be found against him, there shall be judgment *quod querens nil capiat*, &c. If the verdict be against the defendant on this plea, it is necessary that the jury should find the amount of the assets, for which alone the plaintiff shall obtain judgment. It is necessary, too, that the plaintiff should have proved the amount of this claim, for though the plea admits the debt it does not admit the amount of it.<sup>8</sup> Upon the plea of *plene administravit*,

<sup>1</sup> Rapp v. Elliot, 2 Dallas 184; and see Furry v. Stone, 1 Yeates 186; Addis. 114.

<sup>2</sup> Lausatt v. Lippincott, 6 S. & R. 386.

<sup>3</sup> Cahill v. Benn, 6 Binn. 99.

<sup>4</sup> Lessee of Hill v. West, 1 Ibid. 486.

<sup>5</sup> Bradley v. Flowers, 4 Yeates 436.

<sup>6</sup> Per cur.

<sup>7</sup> Per YEATES, J., Bond v. Gardiner,

4 Binn. 281.

<sup>8</sup> Cro. Eliz. 102.

<sup>9</sup> Ibid.

and verdict for the plaintiff, the judgment for all but the costs is to be *of the goods of the testator*.<sup>1</sup> On such an issue, the jury are not authorized to find that the defendant had wasted the goods, and the court cannot on such verdict order judgment for the whole amount of damages and costs to be entered *de bonis testatoris si, &c., et si non de bonis propriis* of the defendant, unless an issue have been joined on such wasting.<sup>2</sup> When the defendant establishes his plea of no assets, the settled practice is to find for the defendant on the plea, and then for the plaintiff to pray judgment *de terris, &c.*, and of assets *quando acciderint*.<sup>3</sup> Where the administrator does not plead want of assets, and judgment goes against him, and an execution is levied on the personal estate, the plaintiff is entitled to payment of his whole debt; nor will the court enter into any consideration of the nature of the debt.<sup>4</sup> When the creditor, having entered judgment *de terris, &c.*, takes out execution and sells the land, upon payment of the money into court, in order to prevent a failure of justice, the court must assume the power of carrying the Act of Assembly, prescribing the order of paying debts, into effect, and make all orders necessary for the purpose, as the Orphans' Court would do.<sup>5</sup> The plea of *plene administravit* by an executor is a proper one, where the plaintiff in his *narr.* charges the defendant directly with a *devastavit*, or with having money in his hands applicable to the plaintiff's claim. When this plea is filed in a case in which the *narr.* does not aver either one of these facts, a verdict for the plaintiff generally on all the pleas, does not render the executor personally liable for the amount of the claim on which the suit was brought. Since the Act of 24th February 1834, § 37,<sup>6</sup> no mispleading or lack of pleading by executors or administrators can make them liable to pay any debt or damages recovered against them in their representative character, beyond the amount of the assets which in fact have or may come into their hands. A plea of *plene administravit* being irregular where the *narr.* does not aver a *devastavit*, this act prevents the working of any injury to the defendant executor where the plaintiff obtains a verdict.<sup>7</sup>

If judgment has been regularly entered against an administrator on a plea of *plene administravit præter*, it will not be set aside to give him an opportunity to come in and plead a judgment recovered.<sup>8</sup> A judgment entered on a *scire facias post annum et diem*, based upon a previous judgment that was void, or on one of which there is no record, is not therefore void, but may be sustained as a new judgment. If the parties to it do not object, strangers cannot complain of it.<sup>9</sup>

<sup>1</sup> *Swearingen v. Pendleton*, 4 S. & R. 389.

<sup>2</sup> *Ibid.*

<sup>3</sup> 1 Peters's Rep. 442; *Penna. Agricultural and Manufacturing Bank v. Stambaugh's Administrators*, 13 S. & R. 299.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Purd. Dig.* 289, Pamph. L. 80.

<sup>7</sup> *Sergeant's Executors v. Ewing*, 6 Casey 83.

<sup>8</sup> 2 Caines's Rep. 101; see further on this subject, 2 Arch. Pr. 131, 132.

<sup>9</sup> *Buehler's Heirs v. Buffington*, 7 Wright 279.



## SECTION VI.

INTEREST ON JUDGMENTS.<sup>1</sup>

By the second section of the Act of 1700,<sup>2</sup> lawful interest is allowed to the creditor on the amount of his judgment, from the time it is obtained until satisfaction. Interest may, in general, be considered as legally incident to every judgment in this State;<sup>3</sup> but where a plaintiff obtained a verdict, and a new trial was granted upon condition that a judgment should be entered as a security, for whatever might be ultimately recovered, the court upon the second trial instructed the jury, that where a judgment was given merely as a security, the interest ought not to be calculated on the amount of the judgment (which included principal and interest), but only on the sum originally due.<sup>4</sup> Under our Act of Assembly, the practice is stated to have been, both before and since the Revolution, to ascertain the real debt at the time of the judgment entered, and to calculate interest thereon as a new principal;<sup>5</sup> and when credit for partial payments is allowed, the principle of calculation is thus decided. Interest is always calculated on a judgment to the time of the first payment, which is applied in the first instance to discharge the interest, and afterwards, if there be a surplus, to sink the principal, and so *toties quoties*, care being taken that the principal, at any time thus reduced, be not suffered to accumulate by the accruing interest. This rule is sustained not only by usage, but by decision.<sup>6</sup> Interest on a judgment is suspended from the day when land sold on an execution issued under it. But the rule is not extended to cases where it would work injustice; therefore, in a case where judgment was taken by confession, against the drawer of a negotiable note, by the holder, for the purpose of securing the endorser, and the real estate of the drawer was sold by the sheriff, and the appropriation of the proceeds directed to the judgment was delayed for years by appeal to the Supreme Court, it was held that the interest on the amount appropriated did not cease to run in favor of the endorser from the sheriff's sale, and not till actual payment.<sup>7</sup>

On the affirmance of a judgment in the Supreme Court after a writ of error, interest is to be charged on the judgment below till affirmance, and then the aggregate is to bear interest.<sup>8</sup> The plaintiff should not, however, charge interest on the costs, unless he has paid them, and then only from the time of payment.<sup>9</sup> A verdict does not bear interest prior to the entry of judgment; and a judgment cannot be entered for the amount of the verdict, with interest

<sup>1</sup> See, for the cases under this head, Wh. Dig. "Interest."

<sup>2</sup> 1 Sm. Laws 7.

<sup>3</sup> Fitzgerald v. Caldwell's Executors, 4 Dallas 252.

<sup>4</sup> Roberts v. Wheelen, 3 Ibid. 506.

<sup>5</sup> Berryhill v. Wells, 5 Binn. 61.

<sup>6</sup> Per Gibson, J., Commonwealth v. Miller's Administrators, 8 S. & R. 458.

See also Shallor v. Brand, 6 Binn. 435; Porter v. Shaffer, 5 S. & R. 220.

<sup>7</sup> Baker v. Exchange Bank, 12 Harris 391; Siter, James & Co.'s Appeal, 2 Casey 178.

<sup>8</sup> McCausland's Administrators v. Bell, 9 S. & R. 388.

<sup>9</sup> Ibid. 389; Rogers v. Burns, 3 Casey 525.

for the intervening period. On the affirmance of a judgment by the Supreme Court, interest is not to be calculated on the aggregate of the judgment and interest due. In such a case, the original judgment is the amount on which interest is to be charged.<sup>1</sup> Though interest is not a necessary incident of a verdict until judgment be entered thereon, and cannot be included for the intervening time, yet the court have power when granting a rule for new trial, after verdict, to impose terms and to enter judgment so as to carry interest antecedent to the time when it may be finally signed.<sup>2</sup>

## SECTION VII.

## JUDGMENT ON BALANCE FOUND DUE DEFENDANT.

Under the Defalcation Act of 1705,<sup>3</sup> if it appears to the jury, in an action wherein the parties have mutual accounts against each other, that the plaintiff is overpaid, they are directed to find their verdict for the defendant, and to certify to the court how much they find the plaintiff to be indebted, which sum so certified is recorded with the verdict, and deemed as a debt of record. If the plaintiff refuse to pay it, the defendant shall have a *scire facias* and execution for the same, with the costs of that action. By the third section of the same act, the report of referees chosen by the parties in open court, is put on a footing with the verdict under the former section. If, therefore, on such report, or on a verdict, a sum is found due by the plaintiff to the defendant, the latter, until lately, could not enter judgment and issue execution, but was obliged to take a *scire facias*, on which he had judgment and execution for the sum found due.<sup>4</sup> But now, by the Act of April 11th 1848,<sup>5</sup> he is entitled to judgment and execution upon the balance found due him.<sup>6</sup>

No judgment can be entered, in an action on a note, on a verdict "for the defendant," with a certificate in his favor for a sum certain, there having been no evidence of set-off, "and that plaintiff receive back the machine," which was the consideration of the note, the verdict being defective.<sup>7</sup>

The assignment of plaintiff's claim before trial does not deprive the defendant of his right to judgment on a verdict for a balance in his favor when the pleas were payment and set-off.<sup>8</sup>

<sup>1</sup> Kelsey v. Murphy, 6 Casey 340. In Buckman v. Davis, 4 Ibid. 211, there is a *dictum* of Woodward, J., to the following effect; that an award under an amicable reference, filed in pursuance to the submission, draws interest, like a verdict, from the date of its effect. Kelsey v. Murphy would seem to overrule this *dictum*.

<sup>2</sup> Irwin v. Hazleton, 1 Wright 465. The principle of Kelsey v. Murphy is

somewhat limited in its application by the decision in this case.

<sup>3</sup> 1 Sm. Laws 49, Purd. Dig. 331.

<sup>4</sup> Ramsey's Appeal, 2 Watts 228.

<sup>5</sup> Vide Blackburn v. Markle, 6 Binn. 174; Kunckle v. Kunckle, 1 Dallas 364; Kyd on Awards 326 a, 326 h, Am. Editor's note.

<sup>6</sup> Purd. Dig. 331. See ante 469.

<sup>7</sup> Glass v. Blair, 4 Barr 196.

<sup>8</sup> Kline v. Gundrum, 11 St. R. 253.

SECTION VIII.

OPENING JUDGMENTS.

1. By whom the motion may be made, and for whose use
2. What character of defence must be shown.
3. What excuse given for the default.
4. Within what time the motion must be made.
5. Practice generally.

1. *By whom the motion may be made, and for whose use.*

A judgment may be opened, as between the parties to it, for one or other of two reasons: 1st. Because of some formal irregularity in its entry—as for instance, where it is entered for want of an appearance in a case in which the plaintiff has neglected to file his declaration; 2d. Because of some good defence, upon the merits of the cause, resident in the defendant, which by his own neglect or carelessness, or ignorance of the fact of the existence of the suit against him, he has been deprived of the power of setting up, and which in justice he ought to have the opportunity of establishing before a jury. The cases in which applications are made to open judgments or set them aside, on the bases of the second reason, are probably the most frequent, and they are uniformly cases of accident or of mistake, on the part of defendants.

Where, for example, a judgment has been entered, and properly so far as the rules of practice are concerned, for want of an appearance, and the defendant comes into court with the excuse that he was absent from home at the proper time for appearing, he will be permitted to have the judgment opened upon disclosing a good *prima facie* defence; or where again a judgment has been entered, and regularly, upon two returns of *nihil*, the defendant, if he comes before the court with an affidavit of a legal defence, will be given the opportunity of establishing it before a jury. There is a class of cases, it may be here mentioned, where the application to open is not presented by the defendant himself, but by some one who was not made, though entitled to have been made, a party to the suit; and whose interests are affected by the existence or the enforcement of the judgment.<sup>1</sup> The applicants in such cases are not regarded as *third parties* to the judgments; but they will be permitted to take defence upon disclosing to the court, by affidavit or depositions, that which would amount to a defence if established before a jury. A terre-tenant of land charged with a ground-rent, is entitled to be made a party to a suit on the deed; and if he is not summoned, and a judgment is rendered against the covenantor, he will be entitled to have the judgment opened upon showing a defence. In the same manner, a judgment irregularly confessed by a mortgagor after an assignment, will be opened on application of the terre-tenant.<sup>2</sup> But

<sup>1</sup> *Brown v. Simpson*, 2 Watts 239.

<sup>2</sup> *Elkinton v. Fithorn*, D. C., Saturday, October 14th 1843. Why sheriff's sale should not be set aside, judgment opened, and terre-tenant let into defence. *Per curiam*. The mortgage falls due

the court will not open a judgment to suffer a terre-tenant to try an issue whether the judgment be a lien.<sup>1</sup> These are common illustrations of the class of cases to which we have referred.

It is a general principle, well settled in the law, that as between all parties, not only parties to the judgment but all others, that every judgment of a court of competent jurisdiction is binding and conclusive until reversed or opened or set aside for one or other of the reasons which have been stated.<sup>2</sup>

Motions to open judgments on the ground of some formal irregularity, or on the ground of the existence of adequate defence, can generally only be made by the defendants themselves, or by those who, under some statutory law, are entitled to be made parties to the suits. We say *generally*, for it has been suggested by high authority,<sup>3</sup> that if a defendant were to refuse to move for the benefit of his creditors, there might be cases in which they would be permitted to move in his name to open the judgment and let in some *subsequent*, or *perhaps* some *original* matter of defence, which the defendant may have refused or neglected to take advantage of: and this application by creditors would be entertained on the principle, that an insolvent man will not be permitted to give his property away by means of a judgment, which, though proper at first, has become a security for less than the amount of it.

Where, also, the entry of a judgment is an absolute nullity, as in the case of a judgment confessed without a statement of the cause of action, where a rule of court requires such to be filed, any one who has an interest may move that the judgment be stricken off.<sup>4</sup> This principle is not, however, strictly an exception to the rule upon which we are now commenting. In conformity to this rule, until such a motion to open is made, either by the defendant or by some one entitled to be made a party to the suit, or by creditors under the

February 2d 1848, and the *sci. fa.* upon it could not regularly be issued until after the expiration of twelve months from that day. On the 20th April 1848, the defendant made a deed to John H. Benton, and then agreed to confess a judgment on the mortgage, waiving the privilege given by the law. He could not divest his alienees of his rights under the law, without his consent. No evidence has been offered to impeach the deed to Benton; and the rule itself gave sufficient notice to the other party upon inquiry as to his right to interfere. Rule absolute.

<sup>1</sup> *Darrach v. Darrach*, D. C., Saturday, February 17th 1849. *Per curiam*. The question presented in this case is one of some practical interest. It is whether, upon a motion to set aside an execution, we will suffer a terre-tenant to try by an issue whether the judgment, upon which the execution has issued, is a lien. After the fullest consideration, we are of opinion that we

ought not to do so. It comes back, practically, to the question, whether we will direct an issue to try the title of the defendant. There are inconveniences and risks, undoubtedly, in letting the sale go on, and putting the parties to their ejectionment. The probability is, the property will be sacrificed, and some one be a loser. But how can we, in any case, prevent a plaintiff from selling, by execution, the right, title, and interest of the defendant in any property? and were we to order an issue, it might not be conclusive in an ejectionment subsequently brought by the sheriff's vendee, and thus all the expense, time, and trouble of the proceedings would absolutely go for nothing. Rule discharged.

<sup>2</sup> *Sloan v. McKinstry*, 6 Harris 122.

<sup>3</sup> *Per Black, J.*, in *Lewis v. Rogers*.

<sup>4</sup> *Ibid.* 21.

<sup>5</sup> *Baider v. Murray*, 1 Phila. Rep. 273.

condition which has been mentioned, every unreversed judgment is conclusive upon antagonistic creditors and all the world.<sup>1</sup>

But it may be asked, when will creditors be permitted to interfere *directly* in regard to a judgment in the court having control of it, and obtain an order to vacate and annul it between the parties and as to all third persons?

The general rule is, as we have seen, that every application to open a judgment or set it aside *directly*, must come either from the defendant, or some one standing in his rights and subject to his obligations. The question now to be answered is, when and under what circumstances will creditors always be permitted to interfere directly and not collaterally in order to have a judgment opened in regard to which the parties ask no action. The answer is, in a case of collusion and under circumstances of fraud. They will not be permitted; either directly or collaterally, to abate of their own motion simply an erroneous or technically defective judgment. The judgment may be erroneous in every aspect; it may have been entered irregularly and informally, so that an application by the defendants to set it aside would have been entirely successful; or it may have been obtained while the defendant was in the possession of a full and adequate defence: but if the debt upon which it was founded was a *bona fide* debt, its erroneousness in the absence of fraud or collusion will furnish no basis for an application on the part of creditors to set it aside.<sup>2</sup>

Judgments which are not *fraudulent* but are simply *defective*, or account of some irregularity in the process by which they were obtained, are *voidable*; that is, they may be avoided by the parties, though creditors and third parties will not be allowed, either directly or collaterally, to contest their validity. They can only interfere to disturb and contest *void* judgments, or those which, being founded in fraud, are treated as having no existence wherever they touch upon the rights of third persons.

A judgment confessed, for example, by virtue of a power of attorney, which, having been previously employed for the same purpose, is no power at all, is between the parties an invalid judgment. The defendant could at any time interpose, and have it opened by the court; and yet, so far as third persons may be concerned, in the absence of fraud, the judgment is good and valid. A purchaser of real estate upon which such a judgment is a lien, cannot avoid it, or impeach it; for where an interest is subsequently acquired by a third person, with his eyes open, he is not defrauded by what has been done before his time. A judgment entered in the way we have supposed, would not be a fraudulent one under ordinary circumstances, nor would the debt be a pretended debt. The judgment would simply be erroneous, and neither creditor nor terre-tenant, under the rule that we have laid down, would have the right to

<sup>1</sup> *Baider v. Murray*, 1 Phila. Rep. Hauer's Appeal, 5 W. & S. 473; Row-  
273; *James v. Jarrett*, 5 Harris 370. land's Estate, D. Ct., C. C. P., 7 P. L.

<sup>2</sup> *Drexel's Appeal*, 6 Barr 272; J. 312.

impeach it either directly or collaterally.<sup>1</sup> The judgment must be *collusive* and the debt *fictionous*, in order that third parties to it may be enabled to invalidate and destroy it.

A creditor, who comes into the court which rendered a judgment with an allegation of fraud or collusion between the plaintiff and defendant, asking permission to contest the validity of the judgment, may secure an investigation in one or other of two ways. He may move for the opening of the judgment, and that he may be let in to make defence, by showing the fact that it was collusively obtained, or entered with an intention to defraud him—a practice which is said by the Supreme Court to be “a very irregular and slovenly practice,”<sup>2</sup>—or he may apply to the court to order a feigned issue to be instituted and tried, for the purpose of determining the question of fraud or collusion.<sup>3</sup> When we speak of attacking a judgment *directly* we have reference to one or other of these two methods,—that of seeking to open on simple motion, or contesting its validity by an issue in the court which rendered it. The reader will remember this definition in studying the present section.

The application by a creditor for a feigned issue, under the Act of Assembly relative to the distribution of the proceeds of a sheriff's sale, to try the validity of a judgment entered against his debtor, must be based on an affidavit setting forth that there are material facts in dispute, and also the nature and character of such facts. It is not enough that the deponent alleges collusion and fraud, but the grounds of this belief must be distinctly and specifically disclosed, in order that the court may judge whether the belief is warranted, and whether the case is a proper one for a jury to pass upon.<sup>4</sup> It is competent for the court to direct the question or questions to be tried—the form of the issue—and the parties to it. Even the parties may be ordered to be examined.<sup>5</sup>

It ought to be remarked, that the fraud which will enable creditors to avoid directly a judgment entered against a debtor, does not consist merely of a fraudulent intention; but the intention, if fraudulent, must be followed by some act done in pursuance of the intention by the debtor. If the fraudulent intention in any particular case coexist with the act resulting in the defraudment of the creditor, the judgment as against him is absolutely void. Even if a judgment is honest in amount, yet if it were given and received for a fraudulent purpose, the judgment will be regarded invalid if it affect the rights of creditors; for in such a case we have something more than a mere fraudulent intention—we have an act done in pursuance of the intention; viz., the giving and receiving of the judgment. Then the judgment is an act tainted with a fraudulent intent, and the law will not allow it to be used so as to affect any rights that are in a position to question it. Even an honest use of such a judgment would not defeat the right of third parties to object to it;

<sup>1</sup> *Martin v. Rex*, 6 S. & R. 296; *Whiting v. Johnson*, 11 *Ibid.* 328.

*Hauer's Appeal*, 5 W. & S. 473;  
*Drexel's Appeal*, 6 Barr 272.

<sup>4</sup> *Robinson, Minis & Miller's Appeal*,  
12 *Casey* 81.

<sup>3</sup> *Brown v. Simpson*, 2 *Watts* 239.

<sup>5</sup> *Ringwalt v. Ahl*, *Ibid.* 336.

<sup>2</sup> *Kellogg v. Krauser*, 14 S. & R. 137;

because a judgment obtained in order to defraud creditors, cannot be purified by merely abandoning the fraudulent purpose and using it for an honest one. All the benefits of the fraudulent arrangement must be foregone. It must not even be used to obtain an unforbidden preference over them. It is voidable by creditors whenever and however it may be used to their prejudice, because it was made to defraud them. The debtor cannot object, but creditors can, whenever it comes in conflict with their rights.<sup>1</sup>

Such are the circumstances under which third parties may impeach judgments *directly* on the ground which has been mentioned. We have now to consider briefly, in what cases they have the power and the right to impeach judgments *collaterally*, *i. e.*, in proceedings collateral to those by which they were obtained.

It may be laid down as a general and fundamental rule, that a third party has the right to interfere with a judgment in a collateral proceeding on one ground only; viz., that of covin or collusion between the parties to it in fraud of his rights.<sup>2</sup> While it stands as a debt of record, unabated in whole or in part, an antagonistic creditor cannot attack it for such irregularities as would avail the debtor on a motion to open, or for any matters of defence, original or subsequent, which the debtor would be entitled to set up after the judgment should be opened.<sup>3</sup> Even the debtor cannot in a collateral inquiry avail himself of any matters which have been pleaded or given in evidence, or which might have been in bar of the original action; and much less can third parties. Where, for example, an attorney confesses judgment against several partners, under an authority derived from only one, it is the duty of the others to make immediate application to open the judgment, and they cannot avail themselves of the defect in the attorney's authority to confess the judgment, in an action brought by the sheriff's vendee of their land against them for the recovery of possession.<sup>4</sup> Such a judgment is voidable, and every voidable judgment is binding and conclusive until reversed or set aside by a legal proceeding, through the intervention of parties or privies thereto.<sup>5</sup> The ground upon which the courts have proceeded in holding that creditors cannot impeach a judgment for irregularities which the judgment-debtor might have taken advantage of, is the simple one that the erroneousness of the judgment was no wrong to them. If the debt was a *bonâ fide* one, they were not entitled to priority to the judgment; because priority is the debtor's gift. If the creditor preferred has not thought it worth while to look to it, that his debt was secured by a proper judgment, and if the debtor does not choose to take advantage of the irregularity in the proceeding through which the judgment was obtained, then, certainly, it is no business of the creditor, who has not been preferred, to object. The want of an actual debt, as a foundation for a judgment, is an incurable vice, which vitiates it whenever it comes in conflict with the rights of creditors. The

<sup>1</sup> Bunn *et al.* v. Ahl, 5 Casey 387.

<sup>2</sup> Dickerson's Appeal, 7 Barr 257;  
Watson v. Willard, 9 Ibid. 94; Postens  
v. Postens, 3 W. & S. 135.

<sup>3</sup> Lewis v. Rogers, 4 Harris 21.

<sup>4</sup> Cyphert v. McClune, 10 Ibid. 197.

<sup>5</sup> Sloan v. McKinstry, 6 Ibid. 122;  
Breeding v. Boggs, 8 Ibid. 33.

judgment may not be absolutely void, for so long as the debtor interposes no objection the judgment stands; but as soon as its fraudulent purpose comes into operation, creditors may abate it because it would sweep away their sources of payment.<sup>1</sup> What is fraud in the judicial sense, and what are the tests of it, we have already considered, in speaking of the cases in which creditors are allowed to attack a judgment in the court which rendered it; and the same principles apply to those cases in which creditors seek to avoid a judgment, entered to defraud them in some collateral inquiry.<sup>2</sup> The only point which now remains for consideration, under the present head, is the practice of the several courts in relation to the trial of the question of covin or collusion, which is always raised when creditors attempt to impeach the judgments of their debtors. This is in the main a question of fact. It is competent to raise such a question in the Orphans' Court upon the settlement of the account of an executor or administrator. The auditor appointed to distribute the fund in an accountant's hands, may determine the *bona fides* of a judgment if the question is raised before him; or he may report an issue to the Orphans' Court which will be referred to the Court of Common Pleas for trial.<sup>3</sup> The Court of Common Pleas has ability to try such a question, although the judgment in regard to which the issue is raised is a judgment of the District Court.<sup>4</sup>

In the District Court of Philadelphia, auditors appointed to distribute the proceeds of sheriffs' sales, may determine that judgments are fraudulent as to the parties impeaching them. An auditor acting under the authority of that court, has power either to decide the facts upon which the question of fraud or collusion is raised, or

<sup>1</sup> Hauer's Appeal, 5 W. & S. 473, where the principle is exhaustively expounded by C. J. GIBSON.

<sup>2</sup> See, in regard to the subject of fraud, the opinion by LOWRIE, J., in *Smith v. Smith, Murphy & Co.*, 9 Harris 367.

<sup>3</sup> The practice in relation to the formation of an issue before an auditor in the Orphans' Court, and its reference to the Court of Common Pleas, may be stated thus:—The demand for an issue is a question which the auditor is to determine in the first instance. It must be made before him in proper time, so as to enable him to receive and decide on the evidence upon which the demand is founded. He has, then, to determine upon the materiality of the fact to a decision of the case, and the propriety of having it decided by a jury. If the question is a mixed one of law and fact, it is improper for him to decide in favor of the issue, unless the question of fact is specifically evolved. If the auditor decides from the evidence submitted by the contesting parties in favor of the propriety

of an issue, he so reports to the court, specifying particularly the fact or facts in dispute. This is to guide the court in framing the issue for their trial. If the auditor determines adversely to the propriety of the issue, he proceeds with the audit, and in his final report to the court, he should mention the fact that an issue had been demanded and refused; and if the evidence taken before him is requested by either of the parties, it should be annexed to his report. The court then pass upon his decision in regard to the issue. If they differ with the auditor, they will grant the issue which he has refused, and refer the facts to a court of law for trial. No party can be entitled to have an issue awarded by an auditor upon a mere denial of the rights of his opponent. It must be shown that there are *facts* in dispute by proper and full evidence: *Beehler's Estate*, Leg. Int. vol. XV., 1858, p. 350., 3 Phila. Rep. 254, s. c.

<sup>4</sup> *Postens v. Postens*, 3 W. & S. 135; *Johnston's Appeal*, 9 Barr 415.



he may report an issue to the court, if it is demanded by the parties in conformity with the rules of the court. A third party cannot attack a judgment before an auditor on the ground of error or irregularity. But a creditor who has a lien prior to the date of the judgment, and it is claimed that the judgment takes priority of him, because rendered upon a debt which was a lien prior to the judgment, such a creditor may dispute the validity of the prior judgment. A judgment—and this is the ground upon which the distinction is placed—a judgment is conclusive evidence to all the world that there is such a judgment; but beyond its legal effects as a judgment, as evidence that the debt recovered was due ten days or ten years before—though, as between the parties, this element and others enter into the very vitality of the judgment,—the judgment has no weight as against strangers, much less is its evidence conclusive of their rights.<sup>1</sup>

It may be generally remarked in concluding this section, that in our Pennsylvania practice a motion to vacate a judgment is the usual substitute for the older remedies of *audita querela*, *error coram nobis*, or *bill in equity* to vacate the judgment.<sup>2</sup> These remedies are still recognised as existing, but they are little used;<sup>3</sup> and, generally, we arrive at the same results upon motion, as those that were attained under the more ancient practice.<sup>4</sup>

## 2. What character of defence must be shown.

Judgment will be opened when, from examination of the depositions, the court thinks there is a question of fact for a jury.<sup>5</sup>

When a judgment entered on a bond and warrant of attorney is opened, it is only to let in matters of defence which existed at the time of the rendition; never to let in matters subsequent to it, which are determinable in a trial on a *scire facias quare executio non*, or in a summary way, when the facts are not disputed, or the parties do not demand a trial by jury. A converse principle is, that on the trial of a *sci. fa.* the defendant shall not be permitted to go behind the judgment, and set up any matters prior to its entering.<sup>6</sup>

If a judgment be opened upon an affidavit of defence, and the defendant let into a defence upon the merits, he will not, upon the trial, be permitted to take advantage of a technical exception to the form of action;<sup>7</sup> *e. g.*, that the action had been brought in the name of the assignee of a *chose* in action, instead of an assignor.<sup>8</sup>

A judgment will be opened to let in a plea of bankruptcy.<sup>9</sup>

It seems that a judgment may be opened to let in a plea of the Statute of Limitations;<sup>10</sup> and in the District Court of Philadelphia, a judgment of revival, entered on two *nihilis*, was lately opened, on

<sup>1</sup> Cadwalader v. Montgomery, D. C. C. C. P. Sep. 11, 1852, 9 Leg. Int. 133.

<sup>2</sup> Stephens v. Stephens, 1 Phila. Rep. 108.

<sup>3</sup> Hurst v. Fisher, 1 W. & S. 438; Watson v. Mercer, 17 S. & R. 344; Harper et al. v. Kean, 11 Ibid. 290; Day v. Hamburg, 1 Browne 82; Durand v. Halbach, 1 Miles 46.

VOL. I.—42

<sup>4</sup> Kalbach v. Fisher, 1 Rawle 323.

<sup>5</sup> Massey v. Buck, D. C. C. P., 8 Leg. Int. 124, 1 Phila. Rep. 215.

<sup>6</sup> Curtis v. Slosson, 6 Barr 265.

<sup>7</sup> Bailey v. Clayton, 8 Harris 295.

<sup>8</sup> Ekel v. Snevily, 3 W. & S. 272.

<sup>9</sup> Commonwealth v. Huber, 5 P. L. J. 331.

<sup>10</sup> Ekel v. Snevily, 3 W. & S. 272

the ground of the presumption of payment arising from the lapse of twenty years.<sup>1</sup>

But a judgment will not be opened to let in a plea of infancy, when the defendant was of full age when the judgment was taken.<sup>2</sup>

<sup>1</sup> Maitland v. McGonigle, D. C., Saturday, June 17th 1848. Why the judgment and execution should not be set aside. *Per curiam*. This was a judgment obtained upon two returns of *nihil* to a *sci. fa.* to revive a judgment. The judgment was originally entered upon a bond and warrant of attorney, upon the 30th December 1816, against John and Bernard McGonigle. This was revived by a *sci. fa.* returned, "made known," and a judgment by default for want of appearance, July 26th 1822. It was again revived by a *sci. fa.* and a judgment taken upon two *nihil*s, upon the 20th May 1825. The *sci. fa.* upon the judgment which we are now asked to open, was issued upon the 29th December 1847. In the mean time, John, one of the defendants, died, say in June 1827. The courts will always open a judgment upon two returns of *nihil*, where timely application, after knowledge, is made by defendant, and a probable *prima facie* defence is made out. Here, even from the last movement in the cause, the motion to set aside the *alias fi. fa.* levied upon the goods of John McGonigle, the deceased defendant, which motion was made June 13th 1827, more than twenty years elapsed. This is a legal presumption of payment. If we refuse to open this judgment, the defendant will be debarred from a perfectly legal defence, and from aught that appears, and we can possibly know, from loss of vouchers and death of witnesses, a perfectly just defence; and that, too, without any fault or negligence on his part. He has resided during all this period in another county. It is true that there is a short note of a case decided in the Common Pleas of this county, in 1788 (Brown v. Sutter, 1 Dallas 240), in which President SHIPPEN is reported to have said that the court would never open a regular judgment to let in a plea of the Statute of Limitations. It was held, however, in this court, in 1813, during the presidency of Judge HEMPHILL, in Dutilh v. Miller, 2 Browne 311, that the court would exercise a discretion on this subject, and would not restrict a defendant from pleading the statute in such cases, provided he would declare, on oath, the nature of his defence, and

showed that he had just ground for putting in the plea. They affirmed the case of Brown v. Sutter, however, so far as to say, the court ought not to interfere to give defendant the advantage of the plea, upon a general affidavit of defence. However, the present Chief Justice, in the recent case of Ekel v. Snevily, 3 W. & S. 272, uses the following language on this subject: "It was said in Brown v. Sutter, 1 Dallas 240, that a judgment will not be opened to let in the Statute of Limitations, but as the plea of that statute has since been considered, in Shock v. McChesney, 4 Yeates 507, and The Bank v. Israel, 6 S. & R. 294, to be no longer an unconscionable one, the rule of practice would scarcely be held so now. So that Brown v. Sutter is to be considered as considerably shaken, if not overruled. The case before us is much stronger—the lapse of time being so much greater—and the defence arising from presumption of payment equally a legal defence as the Statute of Limitation, though the one has been introduced, and makes a part of the common law, by the decisions of the courts, and the other by the enactment of the legislature." Judgment opened, and defendant let into defence.

Upon the judgment being opened, the defendant pleaded simultaneously a plea in abatement, to the effect that a co-defendant was dead, and *non assumpsit* and payment. The court struck off the plea in abatement, saying they would have put the defendant on terms had their attention been called to it, and that they had no doubt of their power to modify their order afterwards.

<sup>2</sup> Poulson v. Addis, D. C., Saturday, November 4th 1848. Why judgment should not be set aside. *Per curiam*. The defendant appeared by attorney and suffered judgment to be entered against him for want of affidavit of defence, January 24th 1848. He was then of full age. A *fi. fa.* issued; the property was condemned; a *vend. exp.* and a sale; and now defendant asks to be let in to take the defence that he was a minor when the deed was executed upon which the suit was brought. We think he is too late. The judgment is regular; for although

The court is bound to vacate and set aside a judgment entered on a warrant of attorney against a minor. If the fact of infancy is shown by the evidence taken under the rule, or is admitted, the court as a matter of right, and not of discretion, must vacate the judgment.<sup>1</sup>

A judgment for want of an appearance against a *garnishee* will be opened, if promptly applied for and a defence is shown.<sup>2</sup>

The Court of Common Pleas has no power to open a judgment entered on a transcript of a judgment, by a justice of the peace, filed in the court as a lien, and to let the defendant into a defence.<sup>3</sup> The defendant may remove such a cause by *certiorari* into the Court of Common Pleas, if the judgment was rendered against him without a service of the summons; but the *certiorari* must be applied for within a reasonable time, which, under ordinary circumstances, is twenty days after the defendant first had knowledge of the rendering of the judgment against him.<sup>4</sup>

A judgment will not be stricken off because the warrant of attorney appears to be dated on a Sunday. The courts will not on such ground interfere with an executed contract.<sup>5</sup>

(3.) *What excuse given for the default.*

Unless some good reason be given the court will not move, for a party cannot be permitted to set the process of law at contempt. Pending negotiations are no excuse for the delay.<sup>6</sup>

Any mistake or accident, however, will be enough, where it is promptly made, and when there is no contempt.<sup>7</sup>

Where the defendant was absent from home at the proper time for appearing, and, though served before he left, was detained away unexpectedly, so that judgment was taken against him, the court opened the judgment, on a defence being shown.<sup>8</sup>

the entry on the appearance-docket is simply "Copy of ground-rent deed filed," yet the copy filed was endorsed, "Copy of ground-rent and other deeds," and the other deeds were the assignments of the ground-rent. Rule dismissed.

<sup>1</sup> Knox v. Flack, 10 Harris 337.

<sup>2</sup> Nicholson v. Fitzpatrick, 2 Phila. Rep. 205.

<sup>3</sup> Lacock v. White, 7 Harris 495.

<sup>4</sup> Stedman v. Bradford, 15 Leg. Int. 1858, p. 357.

<sup>5</sup> Baker v. Lukens, 11 Casey 146.

<sup>6</sup> McQuillan v. Hunter, D. C., Saturday, March 23d 1850, 1 Phila. Rep. 49.

<sup>7</sup> Blackwood v. Finley, D. C., Saturday, Oct. 7th 1848. Why judgment and *fi. fa.* should not be set aside. *Per curiam.* This judgment was taken September 23d 1848, for want of an affidavit of defence. In such cases, where the application for relief is prompt, the court is liberal. It is true, the affidavit in excuse of the default shows some negligence or stupidity, but it is evident that the defendants

were embarrassed by the fact of two suits being brought in different courts, and thinking they had done all that was necessary by retaining counsel, supposed the summons to relate to the first suit, in which there had been no service. The affidavit shows a set-off, and in cases of prompt application for relief, especially, we make no distinction between this and any other kind of defence. The law of Pennsylvania pre-eminently favors defalcation. The plaintiff is in no worse position than if defendants had appeared and taken this defence. Indeed, he is in a better situation, for he has the lien of a judgment as a security; for in these cases, where the proceeding is regular on its face, we do not set aside, but only open the judgment, and let the defendant into a defence. *Fi. fa.* set aside, judgment opened, and defendant let into a defence.

<sup>8</sup> Sheerer v. Adams, D. C., Monday, March 6th 1848. Why judgment should not be opened; execution set aside. *Per curiam.* This was a judgment

(4.) *Within what time the motion must be made.*

In the United States Circuit Court it was held that a judgment obtained at a former court cannot be set aside, however erroneous, unless it was entered by misprision of the clerk, by fraud, or the like.<sup>1</sup>

The power of the Court of Common Pleas in relation to the opening of judgments is most ample; and policy requires that it should be liberally used. It is a matter depending on the sound discretion of the court, who are not prevented by lapse of time, or the fact of a judgment having been renewed by successive *scire facies*, from affording relief,<sup>2</sup> though it is said that, after the end of the term in which the court has rendered judgment upon a case stated on a special or general verdict, from which an appeal may be taken by writ of error or otherwise, it cannot alter or change it, with a view to correct what the court upon further reflection may consider an error therein.<sup>3</sup>

"On general principles," says Judge Sergeant, "a judgment is binding and conclusive until reversed or set aside by a legal proceeding; and it is very questionable whether the court in which a judgment has been entered, can open the judgment where it was obtained several years before in an adverse proceeding, and afterwards duly revived."<sup>4</sup>

"I will not say," says Chief Justice Gibson, "that a judgment by default, or on confession, may not be opened at a succeeding term, on the ground of a defence arising *subsequently*, provided it do not interfere with rights acquired under the judgment, and by third persons, but the security of titles founded on judicial proceedings might be invaded by the exercise of an arbitrary and unconstitutional discretion of the courts over their own records."<sup>5</sup> It is exceedingly doubtful whether a court has power to send back the report of auditors, appointed after a judgment *quod computet* in an action of account render, that they may certify issues of law after final judgment had been entered on their report, removed to the Supreme Court, and returned to the court below undisturbed, because no questions of law were raised upon the record. There must be a time

taken for want of an appearance, which was entered by plaintiff's attorney in the office. It has been objected that it is irregular on that account. We are, however, of a different opinion. It is the most convenient and proper practice to take such a judgment as well as a judgment for want of a plea in the office. The prothonotary is entirely competent to see that such a judgment is not entered, when in point of fact there is an appearance or a plea.

However, it has been the uniform practice of this court to open even regular judgments by default, where the defendant comes in promptly, excuses his default, and shows that he has a defence. Here the defendant says he was absent from home at the

proper time for appearing; and though he was served before he went away, that he was detained unexpectedly. He has also sworn to a defence. The plaintiff here has lost nothing; he could not have had a trial; the judgment will stand as security for what may ultimately be recovered; and the defendant must pay the costs of the execution.

Rule absolute on payment of the costs of the execution by defendant.

<sup>1</sup> Medford v. Dorsey, 2 Wash. C. C. R. 433.

<sup>2</sup> Kalbach v. Fisher, 1 Rawle 323.

<sup>3</sup> Stephens v. Cowan, 6 Watts 513.

<sup>4</sup> Stiles v. Bradford, 4 Rawle 401.

<sup>5</sup> Catlin v. Robinson, 2 Watts 380.

when the power of a court to open its own judgments, obtained adversely, ceases. In England it ends with the term at which the judgment is signed. The English rule would seem to have been recognised as existing in Pennsylvania.<sup>1</sup>

The practice of the District Court in Philadelphia is, where a defendant comes forward in a reasonable time, and makes a proper excuse for his non-appearance, to open judgment by default, and let him into a defence;<sup>2</sup> though, as has already been noticed, the court will not, under ordinary circumstances, open a judgment and set aside an execution, unless the party asking relief applies immediately on receiving notice of the levy.<sup>3</sup>

(5.) *Practice in opening judgment.*

Where money has been brought into court, and a judgment opened to let the defendant into a defence, if the parties do not proceed within a reasonable time, the court ought to permit the next judgment-creditor to appear as defendant, and rule the plaintiff to trial.<sup>4</sup>

A rule to show cause why a judgment should not be opened, does not stay proceedings without an order to that effect.<sup>5</sup>

The courts of Pennsylvania have the powers of the Court of Chancery to relieve against inequitable judgments.<sup>6</sup> The usual practice is to open the judgment and let the defendant into a defence on the merits, and on the trial of the issue the defendant may show fraud in obtaining the judgment.<sup>7</sup> The power extends to judgments on awards of arbitrators, notwithstanding the statutory remedies in cases of compulsory arbitration.<sup>8</sup>

When a judgment on which a sheriff's sale is founded is set aside, the setting aside of the sale follows as of course on the ground of *restitution*.<sup>9</sup>

The principle, that a pretermitted defence can only be heard on a motion to open the judgment addressed to the court that entered it,

<sup>1</sup> *Mathers's Executor v. Patterson*, 9 Casey 485; *vide Catlin v. Robinson*, 2 Watts 379-80; *Stephens v. Cowan*, 6 Ibid. 513.

<sup>2</sup> *Emerson v. Knight*, D. C. C. P., 7 Leg. Int. 199; 1 Phila. Rep. 121; *Martin v. Hill*, Ibid. 233.

<sup>3</sup> *McQuillan v. Hunter*, D. C. C. P., 7 Leg. Int. 50; 1 Phila. Rep. 49.

<sup>4</sup> *Seibert v. Jones*, Saturday, Feb. 19th 1848. Why judgment should not be stricken off; execution to stay. *Per curiam*. Where a party has cause to open a judgment or set aside an execution, he must not, by his supineness, allow plaintiff to go on incurring costs, and at the very last moment interpose the objection. Here the defendant alleges that the judgment, which was entered upon a bond and warrant, was given with the express understanding that it was not to be entered up until the costs of a former suit between the same parties was paid, which never has

been done. He says, also, that it is for more than was justly due, and he was overreached in the settlement upon which it was given. Yet the judgment was entered May 27th 1844, and a *fi. fa.* was issued to Sept. 1847, upon which a levy was made, and the defendant made an affidavit that the goods levied on were not his, but belonged to an adverse claimant. An *alias fi. fa.* was issued and levied on defendant's real estate, notice given to him, inquisition and condemnation, and then a *vend. exp.* He now applies to have this judgment stricken off on the grounds stated. We think it is too late.

<sup>5</sup> *Fricker's Appeal*, 1 Watts 393.

<sup>6</sup> *Spang v. Commonwealth*, 2 Jones 358.

<sup>7</sup> *Cochran v. Eldridge*, 13 Wright 365.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> *Stephens v. Stephens* (D. C. All.), 7 Leg. Int. 183; 1 Phila. Rep. 108.

is not affected by the fact that the judgment is entered by the prothonotary on a warrant of attorney.<sup>1</sup>

The practice in this State is to *open* a judgment confessed where there is an allegation of a pretermitted defence, and to try the question by issue in the cause; the judgment continuing to be a lien.<sup>2</sup>

The courts have authority to vacate or modify judgments entered by warrant of attorney, either for cause appearing on the record or for such as may be established by depositions.<sup>3</sup>

A judgment will be set aside only for matter appearing on the face of the record.<sup>4</sup>

If there is any case in which a court can strike off a judgment, it must be a very special case, as of fraud, or perjury, or of a judgment entered on a cancelled bond, or of a judgment entered on a warrant of attorney executed by a minor;<sup>5</sup> and then only where the facts are admitted or established on a trial. The court may open a judgment or direct an issue to ascertain whether anything is due, or direct an issue to decide who is entitled to the money, where that is disputed.<sup>6</sup>

Where a joint judgment against two defendants has been opened as to one, it is error in the court to permit execution to issue as to the other, before the trial of the issue to determine whether the defendant, as to whom the judgment has been opened, has been discharged from his joint liability.<sup>7</sup>

Although since the decision of the case of *Talmage v. Burlinghame and Ivons*,<sup>8</sup> and the practice which has so generally obtained, it is too late to question the order of a court in opening a joint judgment as to one defendant, and permitting it to remain as to the other, yet this course is not to be recommended. It would be much better in joint judgments, at least, to pursue the English practice of ordering a collateral issue with the proper parties to try the matters alleged by way of defence, staying the proceedings, if

<sup>1</sup> *McVeagh v. Little*, 7 Barr 279.

<sup>2</sup> *Gallup v. Reynolds*, 8 Watts 424. Gibson, C. J.

<sup>3</sup> *Hutchinson v. Ledlie*, 12 Casey 112.

<sup>4</sup> *Devereux v. Roper*, January 25th 1851. Rule to set aside judgment. *Per curiam*. It is the established practice of the court only to set aside a judgment for matter appearing upon the face of the record. It has not been adopted arbitrarily, but has sound reason in its support. An order of a court setting aside a judgment is subject to a writ of error, and if it be done upon matter *dehors* the record, how can the grounds of it appear to the court above? It is true we proceed by depositions, but that is not essential. We might hear testimony at bar, and there is no bill of exceptions nor any mode by which, as a matter of right, the party aggrieved could have the evidence spread upon the record. If the depositions were filed, it is doubtful whether

the court of errors could or would re-examine the decision as far as matters of facts. There are two things which, in all our rules of practice, it is the especial duty of the court to take care of: 1. To maintain in its purity the constitutional right of trial by jury; and, 2. To preserve carefully to every suitor his right to have the law in regard to his case determined in the court of the last resort. Any practice which tends to impair either of these must necessarily be bad. The party seeking to have this judgment set aside has his legal remedies, in the pursuit of which his opponent will have his right of trial by jury, and his writ of error to the Supreme Court, with the benefit of a bill of exceptions. R. D.

<sup>5</sup> *Knox v. Flack*, 10 Harris 337.

<sup>6</sup> *Humphreys v. Rawn*, 8 Watts 80. Huston, J.

<sup>7</sup> *Struthers v. Lloyd*, 2 Harris 216.

<sup>8</sup> 9 Barr 21.

necessary, or permitting execution to issue to bring the money into court, according to the circumstances and equity of the case.<sup>1</sup>

Where a joint judgment is set aside as to one defendant after levy and sale of joint property, it will not affect the title of the purchaser.<sup>2</sup>

A feigned issue will not be granted to try the validity of a judgment, unless to inform the conscience of the court in the decision of some question before them.<sup>3</sup>

Wherever the writ of *audita querela* would lie, the court will grant relief on *motion*; but it is too late to apply for relief after judgment, when the party might have applied before, and neglected it. In such case, relief can be obtained only by the writ of error *coram nobis*.<sup>4</sup> It is said that no judgment ought to be opened without imposing terms which would forbid advantage to be taken of a mere technical error; because a party has really no right to a hearing after a judgment, except for causes which touch the honesty and justice of the case.<sup>5</sup> But the opening of a judgment by default on the terms that the case be tried on the merits, does not preclude the defendant from taking advantage of the invalidity of the bond sued on.<sup>6</sup> If a judgment is opened without conditions, and a feigned issue awarded to try the validity of the judgment, the burden of proof is on the plaintiff.<sup>7</sup>

It is clear that the Court of Common Pleas have a discretionary power to impose terms as a condition of their interference in opening judgments, and they ought to prescribe the issue, so as to draw into contest no more than the matters alleged as a defence in the affidavit, and to exclude pleas of the Statute of Limitations not relied upon therein.<sup>8</sup>

The court have unlimited power to impose terms on opening a judgment, and may direct an affidavit of defence to stand as a plea, and that the parties shall go to trial on the facts stated in it; where this, however, is omitted by the court, the defendant cannot be presumed to have waived the benefit of a formal plea and issue, and it would be error to try the case in his absence on such affidavit.<sup>9</sup>

This practice is peculiar to us, and, from its looseness, its nature is not very distinctly perceived. There is no trace of it in the English books; for where sufficient cause is shown, their practice is to order the warrant of attorney to be given up, and the judgment set aside if entered; and this, whether the judgment be irregular or by default on affidavit of merits. No instance exists of an English court opening a judgment, in our sense of the term; their practice is to award a collateral issue, and only when facts are alleged to be in contest, instead of an issue in the cause. Our practice gives the defendant all proper benefit of his defence, without depriving the plaintiff of the lien of his judgment. We overturn the judgment for

<sup>1</sup> Beeler's Road, 9 Barr 217. Rogers, J.

Casey 522.

<sup>2</sup> Kelly's Appeal, 4 Harris 62.

<sup>3</sup> Carson v. Coulter, 2 Grant's Cases 124.

<sup>4</sup> Rowland's Estate, 7 P. L. J. 312.

<sup>5</sup> Gilkyson v. Larue, 6 W. & S. 217; Ekel v. Snevily, 3 Ibid. 272.

<sup>6</sup> Durand v. Halbach, 1 Miles 46.

<sup>7</sup> Bailey v. Clayton, 8 Harris 295.

<sup>8</sup> Ensly v. Wright, 3 Barr 502.

<sup>9</sup> Bradley v. The Commonwealth, 7

irregularity or collusion in its rendition ; but for pretermitted matter of defence it is opened, it being impossible to say what may be found due. Collusion is tried by a collateral issue ; matter of defence by an issue in the cause. To open, is not to set aside ; for when closed again by finding a sum due, execution issues upon it, as if it had not been disturbed.<sup>1</sup> It may be opened upon terms ; and it is usual to direct it to stand as a security, though this is unnecessary, as opening it deprives it of no quality but its maturity for execution.<sup>2</sup>

The action of a court in opening a judgment and in entering judgment for the defendant in the same, though erroneous and afterwards reversed, does not dispense with the necessity of a *scire facias* to continue the lien.<sup>3</sup>

Where a judgment has been opened for the purpose of giving the defendant an opportunity of showing that he is entitled to a deduction for matter arising subsequently to the judgment, a verdict finding a balance in favor of the *defendant* is erroneous, and a judgment in favor of the defendant for such balance will be reversed.<sup>4</sup>

Where a judgment is opened for the purpose of trying whether the bond on which the judgment was entered was not given by collusion between the plaintiff and the defendant to defraud creditors, it is not necessary that the creditors should be made parties to the suit.<sup>5</sup>

Where proceedings are stayed, on a rule to open a judgment after a levy on a *fi. fa.*, it is incumbent on the sheriff to preserve the property, to meet the exigencies of the contest ; or, if of a perishable nature, permission may be obtained to dispose of it, paying the avails into court.<sup>6</sup>

Under the Act of April 16th 1849 (since repealed), on the subject of fraudulent judgments, the practice was to let the execution go on, order the proceeds into court, and then award an issue to determine the question of fraud.<sup>7</sup>

A tenant who applies to the court to open a judgment, and to be let in to a defence as to its lien on his land, does not thereby become a party *qua* party to the writ of *scire facias*, upon which the judgment was entered.<sup>8</sup>

<sup>1</sup> Carson v. Coulter, 2 Grant 124 ; Gloninger v. Hazard, 18 Leg. Int. (1861) p. 157.

<sup>2</sup> See Gallup v. Reynolds, 8 Watts 424.

<sup>3</sup> Styer's Appeal, 9 Harris 86.

<sup>4</sup> Harper v. Kean, 11 S. & R. 230.

<sup>5</sup> Whiting v. Johnson, Ibid. 328. See Shulze's Appeal, 1 Barr 254.

<sup>6</sup> Spang v. Commonwealth, 2 Jones 358. See, generally, as to practice as to opening judgments, Curtis v. Slosson, 6 Barr 266 ; Drexel's Appeal, Ibid. 275 ; Harrison v. Soles, Ibid. 395 ; Rowland's Estate, 7 P. L. J. 312.

<sup>7</sup> Brown v. Herring, D. C., June 14th 1851, 1 Phila. Rep. 202 ; Prowattain v. Gillingham, Dec. 13th 1851, Ibid. 271.

Since these decisions, however, by the Act of May 4th 1852, § 5, it is enact-

ed that the proviso to the fourth section of the Act of the 16th of April 1849, entitled "An Act relating to habitual drunkards," &c., which enacts, "That no *bonâ fide* judgment or lien acquired against the property of any debtor, or any sale or transfer of the property of such debtor, unless the same shall have been obtained, acquired, or made with intent to evade the provisions of the said act, shall be avoided or defeated by the subsequent discovery that such debtor was insolvent at the time such judgment was obtained, lien acquired, or transfer made," be and the same is hereby repealed: Dunlop's Laws of Penn. 1167. See also Hutchinson v. McClure, 8 Harris 66.

<sup>8</sup> Brown v. Simpson, 2 Watts 233.



It has been already intimated, upon a suggestion of the Supreme Court, that where creditors seek to open a judgment on the ground of fraud, the better practice is for the court, instead of opening the judgment as in the case where a defendant seeks to interpose a defence, to grant a feigned issue to try the question of fraud. In the same case the express intimation of the judge who delivered the opinion of the court<sup>1</sup> is, that the practice should be the same in every case where a terre-tenant applies, after judgment, in an action of *scire facias*, to have the question tried and determined whether the land is bound by the judgment or not. The court should not open the judgment, but should order a feigned issue to be made up and tried between the plaintiff in the execution and him, for the purpose of ascertaining the fact in question, and order that the sale of the land shall be stayed until the trial of the feigned issue is had.

The question has arisen whether the decision of a court of original jurisdiction on an application to open one of its own judgments, is the subject of review on a writ of error. The general answer is, that it is not. The principle is, that the refusal of a court of original jurisdiction to open its judgment is a matter resting in their discretion, and not assignable for error.<sup>2</sup> But the principle is subject to this qualification, that whenever a court *exceeds* its power, its action may be annulled on error by the Supreme Court.<sup>3</sup> Thus, a judgment on a mortgage was rendered at November Term 1826, and the land sold, under an execution, at the succeeding term of the court. In 1829, settlers on the land obtained a rule to show cause why the judgment should not be opened and they let into a defence, which was made absolute. The purchaser of the land at the sale had in the mean time obtained a judgment in ejectment against them. The court above held that the day of discretion had passed, and that the action of the court below in regard to the opening of the judgment ought to be, and it was accordingly, reversed.<sup>4</sup> Where, also, a judgment was entered on a warrant of attorney against a minor, and the court below refused to set it aside, it was held that the judgment could be reversed on error. This the Supreme Court decided was a matter of right, not discretion.<sup>5</sup>

As will hereafter be more fully seen, when treating of feigned issues,<sup>6</sup> a writ of error now lies to the proceedings of the court in which the issue is tried.

<sup>1</sup> Mr. Justice KENNEDY in *Brown v. Huston v. Mitchell*, 14 *Ibid.* 310. Simpson, 2 Watts 233.

<sup>4</sup> *Catlin v. Robinson*, 2 Watts 373.

<sup>2</sup> *Compher v. Anawalt*, 2 Watts 492;

<sup>5</sup> *Knox v. Flack*, 10 Harris 337.

*Bunce v. Wightman*, 5 Casey 336;

*Kalbach v. Fisher*, 1 Rawle 323.

(See the cases cited there: 1 Dallas 165; 5 S. & R. 373; 17 *Ibid.* 364.)

<sup>6</sup> *Bailey v. Musgrave*, 2 S. & R. 220;

<sup>6</sup> Title "Execution," *post*.

## SECTION IX.

## ASSIGNMENT OF JUDGMENTS.

A sale of a judgment is good though made by parol.<sup>1</sup>

An assignment of a judgment on record is not constructive notice thereof to the debtor: hence, payment by him to the obligee before notice of the assignment is good.<sup>2</sup>

Where a judgment was assigned in general terms, and at the foot of the assignment a certain amount was set down in figures, it was held that the statement of the amount was only matter of description, and did not amount to a warranty that so much was due.<sup>3</sup>

On the trial of a feigned issue to determine whether a judgment assigned to the plaintiff was a lien, it was held not to be error to charge the jury, that "if the assignor agreed not to enter judgment, and declared to the defendant that no judgment had been entered, the effect would be to render the judgment null and void, and it would be a fraud to proceed on the judgment under such circumstances."<sup>4</sup>

One who pays the amount of a judgment to the holder of it, is entitled to control it, and issue execution upon it, without an actual assignment of it.<sup>5</sup>

The assignor of a judgment is not liable for the failure of the debtor to pay, unless there have been fraud or an express warranty.<sup>6</sup>

In 1816, A. confessed a judgment in favor of B., his sister, who was tenant in common with him of certain real estate. In 1818, A. and B. conveyed their real estate to assignees, for the benefit of creditors. Afterwards, the same estate was sold under a prior mortgage. It was held that the judgment in favor of B. must be postponed to the debts provided for by the assignment, though the judgment was subsequently transferred to one who had paid full value for it.<sup>7</sup>

The assignee of a judgment takes it subject to all equities subsisting between the assignor and other persons at the time of the assignment.<sup>8</sup>

It seems that the assignment of a judgment in Pennsylvania, or the marking of a judgment to the use of another, does not imply any covenant or warranty that the said judgment will be paid.<sup>9</sup>

An entry such as this on the record, "These judgments stand for the use of M. F.," amounts to an assignment of the judgments with all their incidents; and such an entry, made by the attorney, is as binding as if by the principal; and such an assignment embraces the judgments against *terre-tenants*, as well as those against the

<sup>1</sup> Levering v. Phillips, 7 Barr 387.

<sup>2</sup> Henry v. Brothers, 12 Wright 70.

<sup>3</sup> Oyster v. Waugh, 4 Watts 158.

<sup>4</sup> Kellogg v. Krauser, 14 S. & R. 137.

<sup>5</sup> Gratz v. Farmers' Bank, 5 Watts 99; Fleming v. Beaver, cited Ibid.

<sup>6</sup> Jackson v. Crawford, 12 S. & R.

165; s. c. and s. p., 14 Ibid. 290.

<sup>7</sup> Miffin v. Rasey, 3 Rawle 483.

<sup>8</sup> Himes v. Barnitz, 8 Watts 39;

Porter v. Boone, 1 W. & S. 252.

<sup>9</sup> Mohler's Appeal, 5 Barr 418. See, as to an assignment of part of judgment,

Porter v. Boone, 1 W. & S. 251.

obligors, though separately rendered.<sup>1</sup> "The entry," said Rogers, J., "amounts to a common assignment of the judgment, with all its incidents; and although made by the attorney, yet it is entitled to the same consideration as if made by the principal." The court in which a judgment remains unsatisfied may protect the interests of an equitable claimant by marking it for his use so as to give the defendant notice not to pay it to the legal plaintiff, but such determination would not be conclusive, especially on third persons.<sup>2</sup>

If the assignee of a moiety of a judgment entered on a bond, does not have his interest therein marked on the docket, and the bond being subsequently in the possession of the obligee, the latter assigns all his interest in the judgment-bond, without notice being had by the second assignee of the former assignment, and notice of assignment to the second assignee is marked on the record, the first assignee will be postponed in favor of the second.<sup>3</sup>

The assignment of a judgment will carry with it a right to a mortgage which secured the bond on which the judgment was entered.<sup>4</sup>

A judgment was assigned for a valuable consideration, but the assignment was not placed on record or there noted; and the plaintiff apparently controlled executions issued upon the judgment. No notice of the assignment was shown to have been given to the defendant till about twelve years after the assignment; and in the mean time the defendant for a valuable consideration obtained a release of the judgment from the plaintiff thereon; it was held that the release was valid against the assignee.<sup>5</sup>

An attorney at law as such has no power to sell his client's judgment, and his attempted sale of it will only bind the client when the act is ratified or adopted by the receipt of the money, or otherwise. A subsequent purchase of a judgment, accompanied or followed by a transfer on the record, will pass the title to such judgment as against a prior purchase not entered of record, and of which the second purchaser had no notice. Where a third party pays the amount of a judgment against a defendant, with the intention of holding it for his own use, although no transfer is taken, it is not a payment and satisfaction of such judgment.<sup>6</sup>

Where a party recovers a judgment in his own name and the money is paid to him, another person claiming a portion of the sum recovered cannot have his rights tried by moving the court in which the judgment is entered to direct such portion to be paid to him, and that the judgment be marked for his use *pro tanto*.<sup>7</sup>

<sup>1</sup> Mohler's Appeal, 5 Barr 420.

<sup>2</sup> Hudson's Appeal, 3 Casey 46.

<sup>3</sup> Fisher v. Knox, 1 Harris 622.

<sup>4</sup> Cathcart's Appeal, 1 Harris 416.

<sup>5</sup> Gaullagher v. Caldwell, 10 Harris 300.

<sup>6</sup> Campbell's Appeal, 5 Casey 401.

<sup>7</sup> Hudson's Appeal, 3 Casey 46.

## SECTION X.

## TRANSFER OF JUDGMENTS TO OTHER COUNTIES.

A creditor or heir of a deceased judgment-creditor may transfer the judgment, by transcript, to another county, so as to secure the assets, under the Act of April 16th 1840; the suggestion of death and substitution of personal representative, may be before or after the transfer in either county, for the purpose of proceeding to execution<sup>1</sup>

The 1st section of the Act of April 16th 1840, enabling a judgment to be transferred from one county to another within this State, requires the whole record to be certified by the prothonotary. The certificate must purport to authenticate an exemplification of the record. A mere copy of the docket entry, certified to be as full and complete as the same remains of record in the court, is not such a transcript as the act requires, and a judgment and execution upon it are invalid.<sup>2</sup>

The transcript of a judgment in the Common Pleas, entered in another county, in pursuance of the Act of April 16th 1840, is not an actual judgment of the court of the county in which it is entered, but a *quasi* judgment for limited purposes; it is evidence of a judgment in the court in which it was originally obtained.<sup>3</sup>

Where the original judgment was set aside at the instance of the defendant for irregularity, and the execution in the second county stayed, it was held, that the judgment on the transcript fell with it; and that the plaintiff having obtained a new judgment, but no transcript of it having been entered, this last judgment had no lien in the county in which the transcript had been first entered.<sup>4</sup>

Under the Act of 1840, an award of arbitrators is not the subject of transfer before the expiration of the time allowed for an appeal; and if appeal be entered, the record is not the subject of removal under the act, before the final determination of the case.<sup>5</sup>

Where a judgment is transferred to another county under the Act of 16th April 1840, the court of such county has no power over it, except for purposes of execution and satisfaction. It cannot inquire into its merits at all.<sup>6</sup> The court in which the primary judgment was obtained, can alone take any action operating on the judgment itself; and if that court direct satisfaction to be entered on payment of the money into court, all further process on the secondary judgment is to be arrested, except for its own costs in a proper case.<sup>7</sup> *It seems* that the power of a court to open its judgment, obtained adversely, ceases with the expiration of the term at which they were obtained.<sup>8</sup>

<sup>1</sup> *Walt v. Swinehart*, 8 Barr 97.

<sup>2</sup> *Uppergraff v. Perry*, 4 *Ibid.* 291; see *Bank of Chester County v. Olwine*, 6 P. L. J. 154. *Brandt's Appeal*, 4 Harris 343.

<sup>3</sup> *Brandt's Appeal*, *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Hallman's Appeal*, 6 Harris 310.

<sup>6</sup> *King v. Nimick*, 10 Casey 297.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Mathers's Executor v. Patterson*, 9 *Ibid.* 485.

A judgment transferred under the Act of Assembly, has its full force and effect so far as regards questions of lien and execution. A stay of execution, granted in the county where it was originally entered, does not affect any execution-process issued upon the secondary judgment in the county to which it has been removed.<sup>1</sup>

## SECTION XI.

## ENTRY OF SATISFACTION OF JUDGMENT.

When the judgment is satisfied by payment, voluntarily made, or enforced by execution, the defendant is entitled to have satisfaction acknowledged and entered of record. The attorney of the plaintiff, under his general authority, may enter satisfaction, and his authority is not limited here, as it is in England, to a year and a day after judgment;<sup>2</sup> but it is usually done by the plaintiff himself, in the office of the prothonotary of the court where the judgment is entered, upon the docket containing the full entries; from which the clerk makes an entry of satisfaction upon the margin of the judgment-index. The Court of Common Pleas have no power to strike from the docket summarily a judgment regularly entered, nor in ordinary cases to compel it to be satisfied; but they may order an issue to try whether a judgment has been actually paid, and if so, enforce the entry of satisfaction under the Act of 1791.<sup>3</sup> Where the presumption of payment of such a judgment depends upon time alone; nothing short of twenty years is sufficient.<sup>4</sup> A married woman has power to enter satisfaction on a judgment given to her while *sole*.<sup>5</sup>

To enforce the entry of satisfaction, the Act of April 1791, § 14,<sup>6</sup> directs the plaintiff to acknowledge it upon the record within eighty days after request made, payment of the costs of suit and tender of his reasonable charges of office, under the penalty of a sum not exceeding one-half the debt recovered. After the original debt has been fully satisfied, the judgment cannot be left open to cover new and distinct engagements between the parties.<sup>7</sup>

If the plaintiff enter on the docket, "Ended, and debt and costs paid," it is equivalent to an entry of satisfaction, and may be pleaded in bar of a new suit for the same cause of action.<sup>8</sup> If the entry have been procured by improper means, such as giving the plaintiff a worthless mortgage, he should apply to the court for leave to expunge the entry, which upon good cause shown might be done.<sup>9</sup> The entry "settled," on the record, would perhaps amount to an entry of satisfaction or discontinuance; but such an entry on the trial-list of a judge never transferred to the docket, and afterwards ordered to be stricken out, verdict and judgment being rendered for the plaintiff, has no such effect, and the lien of such a judgment

<sup>1</sup> Baker v. King, 2 Grant 254.

<sup>2</sup> Gibson v. Phila. Ins. Co., 1 Binn. 405; *ante*, 228.

<sup>3</sup> Horner & McCann v. Hower, 3 Wright 228.

<sup>4</sup> Rogers v. Burns, 3 Casey 525.

<sup>5</sup> Ekert v. Lewis, 4 Phila. Rep. 224.

<sup>6</sup> 3 Sm. Laws 32.

<sup>7</sup> 4 Johns. Ch. R. 247.

<sup>8</sup> Phillips v. Israel, 10 S. & R. 391

<sup>9</sup> Ibid. 392.

would not be postponed to a judgment obtained, after such entries had been made and before they were stricken out.<sup>1</sup> The trial-list certified under an act for holding a special court forms no part of the record.<sup>2</sup>

A defendant cannot be discharged by the court for any sum less than what is contained in a judgment entered on a plain and fair agreement of the parties.<sup>3</sup> But where judgment was entered on an award that the defendant pay so much to the plaintiff on receiving indemnity against certain claims, and the plaintiff afterwards refused giving this indemnity, the court ordered satisfaction to be entered on the judgment, upon payment by the defendant of those claims against which he was to be indemnified.<sup>4</sup> Payments made to a sheriff before the return day of the *fi. fa.* are *pro tanto* satisfaction and extinguishment of the judgment.<sup>5</sup>

The sale of real estate does not of itself satisfy so much of the judgment upon which the sale is had as the land sells for. The right to the credit depends upon the right to receive the money.<sup>6</sup>

A judgment in a *scire facias* upon a mortgage, for the amount of the money due upon the mortgage, is a judgment for "debt or damages," within the 14th section of the Act of 13th April 1791; which provides for entering satisfaction of such judgment, and gives a penalty to the party aggrieved by the refusal to enter satisfaction.<sup>7</sup>

It is not necessary that the party suing for such penalty should prove that he has sustained *actual* damage by the refusal to enter satisfaction; the jury may take into consideration all the circumstances by which the party has suffered vexation and inconvenience.<sup>8</sup>

In contemplation of law, a judgment entered by warrant of attorney is as much an act of the court as if it were formally pronounced on *nil dicit* or *cognovit*; and until it is reversed or set aside, it has all the qualities and effect of a judgment on verdict,<sup>9</sup> and, therefore, such judgment is within the Act of 13th April 1791, providing a penalty for refusing to enter satisfaction thereof.<sup>10</sup>

A plaintiff in such action is not entitled to recover on proving that the *debt* was paid before the judgment was entered. He is estopped by the judgment from showing that the debt did not exist at the time it was entered.<sup>11</sup>

Where satisfaction has been entered fraudulently, the court will order it to be vacated. So where the plaintiff, after he had assigned a judgment to a third person, and given notice to the defendant of such assignment, entered up satisfaction, it was ordered to be vacated.<sup>12</sup> But if, after the satisfaction is entered and before it is vacated, the defendant confesses judgment to a *bona fide* creditor, the second judgment is entitled to priority.<sup>13</sup> Has an attorney a right to mark a judgment of his client's to use on receiving the amount of the claim? An attorney's claim does not end with judg-

<sup>1</sup> Moore v. Kline, 1 Pa. Rep. 129.

<sup>2</sup> Ibid; see also Wood v. Vanarsdale,

3 Rawle 401.

<sup>3</sup> Fitzgerald v. Caldwell, Addis. 119.

<sup>4</sup> 2 Wash. C. C. R. 433, 467.

<sup>5</sup> Slusher v. Washington County, 3 Casey 205.

<sup>6</sup> Troutman's Appeal, 11 Harris 491.

<sup>7</sup> Henry v. Sims, 1 Wh. 187.

<sup>8</sup> Ibid.

<sup>9</sup> Braddee v. Brownfield, 4 Watts 474.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> 1 Johns. Cas. 121, 258.

<sup>13</sup> Ibid. 529.

ment.<sup>1</sup> He may agree to take off a *non pros.* entered in favor of his client without that client's direction or consent.<sup>2</sup> He may stay execution without the payment of the debt.<sup>3</sup> He may order the discharge of the defendant in custody on a *ca. sa.*, whether he has received the amount of the debt or not.<sup>4</sup> No one has ever doubted his authority to enter satisfaction of record on a judgment. His right to sell his client's judgment, especially if the client ratifies his act by receiving the profits of the sale, is clearly recognised in *Campbell's Appeal*.<sup>5</sup> The only risk the party buying the judgment takes is, that the attorney shall account to his client for the price paid.<sup>6</sup>

In a recent case, Mr. Justice Agnew says, "the judge in the court below placed considerable stress on the ground that an attorney has no power to assign his client's judgment. Clearly he has no power, after judgment, to make such an assignment of it to one who pays it, because he is liable to pay, as will continue the judgment to the prejudice of his client's rights in other respects.<sup>7</sup> How far he may transfer it by marking it to the use of the bail who pays it, so as to enable the bail to proceed against his principal for the purpose of reimbursing himself, it is not necessary to decide. Granting that he may do so, this alone would not interfere with the claim of the ground-rent owner to the fund, for his right takes effect by relation back to the date of the deed by which the rent was reserved. The marking of the judgment to the use of the bail, in order to overreach the claim of the ground-rent owner, must be accompanied by another incident, to wit, that of estoppel; for the judgment being posterior in right to the ground-rent, the owner of the latter can only be postponed by some act which led the assignee of the judgment to rely on it in confidence to secure the payment of the subject of the assignment. This could only be by an express agreement to guarantee, or some stipulation requiring postponement in order to effectuate its purpose. While every assignment imports a warranty of title, and that the assignor has done no act to defeat recovery, it does not imply a guarantee of collection, or of the lien as primary, if there be no fraud or misrepresentation as to its priority of lien, certainly an assignor is not to be held by reason of his assignment to have undertaken that the judgment is prior to all other liens. He is only responsible for the sale of a sound debt, unimpaired by secret defences, payment, or other matter which would render it invalid. But certainly, as himself the holder of a prior encumbrance of record independent of the subject-matter assigned, there can be no legal presumption or equitable estoppel which can hold him liable to be postponed upon his superior lien, as in this case, without any new consideration or express contract."<sup>8</sup>

A surety for stay of execution in a judgment for arrears of ground-rent, who, after the expiration of the stay and judgment

<sup>1</sup> *Lynch v. Commonwealth*, 16 S. & R. 368.

<sup>2</sup> *Reinhold v. Alberti*, 1 Binn. 469.

<sup>3</sup> *Silvis v. Ely*, 3 W. & S. 420.

<sup>4</sup> *Scott v. Seiler*, 5 Watts 235.

<sup>5</sup> *Casey* 401.

<sup>6</sup> *Fassitt v. Middleton*, 11 Wright 214.

<sup>7</sup> *Campbell's Appeal*, 5 Casey 401; *Stackhouse v. O'Hara's Executors*, 2 Harris 89.

<sup>8</sup> *Fassitt v. Middleton*, 11 Wright 214.

upon his recognisance of bail, pays the debt, interest, and costs, and obtains an assignment of the original judgment from the plaintiff's attorney, is not thereby entitled to priority over a judgment afterwards obtained by the same plaintiff for arrears of rent subsequently accrued.<sup>1</sup>

A judgment entered on a *narr.* reciting a bond and warrant of attorney to confess judgment, but without any appearance for defendant or formal confession of judgment, will be set aside as irregular. The entry on the back of the *narr.*, "*Narr.* with confession of judgment," is not a confession of judgment, but a mere memorandum or endorsement.<sup>2</sup>

The Act of April 14th 1851<sup>3</sup> provides that when it shall be made known by petition to any court in the city and county of Philadelphia, in which any judgment or decree for the payment of money has been obtained, that more than ten years have elapsed since the rendition of said judgment or making of said decree, and that the same has been paid by the defendant or defendants, person or persons, against whom the same has been rendered or made, or by some other person, or has been settled or compromised by the payment of a less sum than the amount of such judgment or decree, or by the transfer of property, rights, or credits, received in full thereof, or in settlement and satisfaction thereof, it shall be the duty of said court to examine into the facts set forth in the petition; and upon being satisfied of their truth, to direct the prothonotary of said court, upon the payment of the costs, if any due to him upon such judgment or decree, to enter satisfaction upon the record thereof, which entry of satisfaction shall have the same effect as if made by the plaintiff or plaintiffs in such judgment, or the person or persons entitled to the benefit of the same, or by the complainant or complainants, or person or persons entitled to the benefit of such decree.

It shall be the duty of the court (the act further provides) to which any such petition shall be so as aforesaid presented, to direct notice of the presenting of the same to be given to the attorney at law by whom the action, suit, bill, or proceeding in which said judgment or decree has been obtained was brought or instituted; and if he be dead, then to the plaintiff or plaintiffs, complainant or complainants, or to his or their executors or administrators, if any there be; or if he, she, or they cannot be found in the county where said judgment or decree has been obtained, and the fact shall be so returned by the sheriff of said county, notice to all parties interested in said judgment or decree shall be directed by said court to be published in one or more newspapers published in said county, or in any other place or places in addition thereto, so often as shall be deemed proper.

By the Act of March 27th 1865,<sup>4</sup> it is provided, that "in all

<sup>1</sup> *Fassitt v. Middleton*, 11 Wright 214.

<sup>2</sup> *Lytle v. Colts*, 3 Casey 193.

<sup>3</sup> Pamph. L. 612; *Purd. Dig.* 576.

<sup>4</sup> Sect. 1, Pamph. L. 52, *Purd. Dig.* 1397. By Act of March 22d 1865, § 1, Pamph. L. 575, *Purd. Dig.* 1397, cer-

tain proceedings are provided in Bucks county to try whether a judgment is a lien on a particular property, and in case such judgment is determined to be no lien, the property is to be discharged from such apparent lien and a



cases where a judgment has, or judgments have been, or may be hereafter entered in any court of record in this commonwealth, whether originally or by transfer, from any other court, and it shall appear, by the production of the record, that the same has or have been fully paid, under or by virtue of an execution or executions issued thereon, and satisfaction has not been entered upon the judgment-index or judgment-docket of said court, it shall be the duty of the court in which such judgment or judgments has or have been entered at the instance of any party interested, upon the payment of a fee of twenty-five cents to the prothonotary, to direct said prothonotary to enter satisfaction upon the judgment-index or judgment-docket, and the record thereof."

decree entered of record in the nature of an entry of satisfaction. The same act further provides, that a deposit of money or state bonds sufficient to cover the judgment, interest, and costs may be made, and that such security shall be substituted for the land, and the lien thereby discharged and entry made on record in the nature of a satisfaction.

## CHAPTER XXI.

### PROCEEDINGS IN ERROR.

#### SECTION I. THE VARIOUS PROCEEDINGS IN ERROR. P. 676.

The authority of the Supreme Court to correct errors.

The means of review.

Writ of error.

Appeal.

Certiorari.

Certificate from Nisi Prius.

Where a writ of error is the proper form of remedy.

Where appeal is proper.

Where certiorari is proper.

#### SECTION II. IN WHAT CASES A REVIEW MAY BE HAD. P. 678.

##### 1. *Final Judgments.* P. 678.

Writ of error lies only to a final judgment.

Certiorari lies at any stage of proceedings.

What is a final judgment.

Appeal in Orphans' Court lies to every definitive decree.

What is not a final judgment.

##### 2. *Matters of Discretion.* P. 680.

Writ of error does not lie for matters of discretion in the court below.

What are matters of discretion.

##### 3. *Specific Statutory Regulations.* P. 681.

In certain cases the decision of the lower court is final by statute.

#### SECTION III. FOR WHOM ERROR LIES. P. 681.

Act of 1722 gives writ to every person aggrieved.

Act of 1850 gives writ to each party after decision on writ taken by the other.

Where both parties take writ to the same judgment.

One party can have only one writ to the same judgment.

May be brought by either party.

Unless contrary to his agreement.

Implied agreement not to take writ.

Lies only for a party aggrieved.

Who is a party aggrieved.

Where there are several plaintiffs or defendants.

#### SECTION IV. TIME WITHIN WHICH ERROR MUST BE TAKEN. P. 683.

Limitation of seven years by the Act of 1791.

Limitation to appeals.

Bills of review.

Certificate from Nisi Prius.

#### SECTION V. THE PRELIMINARIES AND THE ISSUE OF THE WRIT. P. 684.

The præcipe.

Tenor of the writ.

Allowance, and special allocatur.

Allowance of certiorari after judgment.

Oath that the writ is not for delay.

Where plaintiff in error is a corporation.

Special allowance of writ out of the proper district.

#### SECTION VI. BAIL IN ERROR. P. 685.

Execution not to be stayed unless bail entered.

Act of 1836.

Condition of the recognisance.

Bail not required of executors, &c.

English statutes in force in Pennsylvania.

Execution already issued, to be stayed on payment of costs.

Appeals from Nisi Prius, security to be absolute.

Bail by corporation.

Form of recognisance.

By whom to be taken.

Two sureties required.

Amendment of recognisance.

Notice to defendant of entry of bail, and exception to sufficiency.

Waiver of oath and recognisance by defendant in error.

Liability of bail.

**SECTION VII. SUPERSEDEAS. P. 687.**

Writ is supersedeas from delivery.  
 Execution not to issue within certain periods after judgment.  
 When an execution is executed.  
 Second writ of error after abatement of first.  
 When the writ is not a supersedeas.  
 Special leave to take out execution notwithstanding a writ of error.

**SECTION VIII. THE RETURN OF THE WRIT. P. 689.**

Writ and record to be returned to Supreme Court.  
 Plaintiff in error to see that proper return is made.  
 Rule of court as to non pros.  
 Rule in case of appeals.

**SECTION IX. AMENDMENT AND QUASHING THE WRIT. P. 690.**

After return the writ may be amended, quashed, abated, or non prossed.  
 Defects amendable.  
 Defects for which the writ will be quashed.  
 Where the court will quash on motion, and where of its own accord.

**SECTION X. ABATEMENT. P. 691.**

Where the writ abates.

**SECTION XI. DIMINUTION OF THE RECORD. P. 692.**

Where the whole record is not certified.  
 Court below is to decide as to the completeness of record.  
 What is part of the record.  
 Certiorari to bring up the rest of the record.  
 Where part of the record is lost.

**SECTION XII. ASSIGNMENT OF ERRORS. P. 693.**

Time of assigning errors.  
 If several plaintiffs in error, they should join in the assignment.  
 Errors not specifically assigned, not noticed.  
 Assignment may be amended by leave.  
 Different kinds of errors assignable.  
 Errors in fact.  
 Errors in law.  
 What errors are not ground for reversal.  
 Defect must be substantial.  
 Must not have been waived.  
 Must be injurious.  
 Must be reviewable.  
 Must appear on the record.  
 Assignment in cases of appeal.

Appeals from the Orphans' Court.  
 Certiorari.

**SECTION XIII. PLEADINGS IN ERROR. P. 696.**

Rule to appear and plead.  
 Common and special pleas.  
 Issue.

**SECTION XIV. ARGUMENT AND PAPER-BOOKS. P. 697.**

Argument-list and calling of the cases.  
 Short causes.  
 Paper-books.

**SECTION XV. JUDGMENT AND VENIRE DE NOVO. P. 701.**

Of affirmance and of barring the writ.  
 Reversal and recall.  
 Reversal in part and affirmance as to residue.  
 Two judgments on the same matter.  
 Power of Supreme Court to modify judgments.  
 Procedendo.  
 Venire de novo.

**SECTION XVI. REMITTITUR. P. 704.**

Act of 1836.  
 Record must be actually remitted.  
 Judgment becomes of record in the court below.  
 Recognisance of bail and sci. fa. on it.  
 Copy of opinion sent with record.

**SECTION XVII. COSTS IN ERROR. P. 705.**

**SECTION XVIII. RESTITUTION. P. 706.**

When it will be ordered and when not.  
 The order of restitution.  
 When made.  
 What will be restored.  
 Nature of the writ.  
 Executor defendant.  
 Lien of the writ.

**SECTION XIX. LIMITATION AS TO NEW SUIT. P. 708.**

**SECTION XX. ERROR CORAM VOBIS. P. 709.**

**SECTION XXI. ERROR IN CRIMINAL CASES. P. 710.**

**SECTION XXII. ERROR TO SUPREME COURT OF UNITED STATES. P. 710.**

**SECTION XXIII. CERTIORARI TO ALDERMAN. P. 710.**

Nature of the writ.

Where and for whom it lies.  
 Preliminary oath and recognisance.  
 Time of issue and service.  
 Service and return.  
 Diminution of record.  
 Assignment of errors.

Errors for which the judgment will be reversed.  
 Hearing.  
 Judgment of Common Pleas final.  
 Execution.  
 Costs.

## SECTION I.

## THE VARIOUS PROCEEDINGS IN ERROR.

AFTER an adverse decision in a court of inferior jurisdiction, a party has in general a right to a review of the proceedings, and the correction of any errors therein by the Supreme Court. "The judicial authority of this court extends to the review and correction of all proceedings of all inferior courts, except where such review is expressly excluded by statute, in accordance with the constitution; and we may issue all sorts of process, and use and adopt all sorts of legal forms that are necessary to give effect to this supervisory authority."<sup>1</sup>

The means of review in common use in Pennsylvania are writs of error, *certiorari*, appeal, bills of review, error *coram nobis*, and in Philadelphia, certificate from the Court at Nisi Prius. Of these, appeals and bills of review are properly equitable remedies, and will be only incidentally noticed here, and error *coram nobis* will be separately discussed.<sup>2</sup>

A writ of error is an original writ issuing out of the Supreme Court, and lies where a party is aggrieved by any error in the foundation, proceedings, judgment, or execution of a suit in a court of record, and the proceedings to be removed were according to the course of the common law.<sup>3</sup> And wherever a new jurisdiction is created by statute, and the court or judge that exercises this jurisdiction acts as a court or judge of record, according to the course of the common law, a writ of error lies on their judgment.<sup>4</sup>

An appeal lies where the proceedings are in equity, or according to equitable forms.

*Certiorari* lies where the proceedings are not according to the course of the common law; or where the court is not of record.<sup>5</sup> The right to issue it follows the creation of a new jurisdiction, proceeding summarily, or not according to the course of the common law,<sup>6</sup> and it is said that it lies in all judicial proceedings where a writ of error does not lie.<sup>7</sup> It is also used as ancillary process to a writ of error or appeal in bringing up portions of the proceedings not returned with the record,<sup>8</sup> and in similar cases which will be noticed hereafter.

<sup>1</sup> LOWRIE, C. J., *Gosline v. Place*, 8 Barr 116. Casey 523.

<sup>2</sup> *Post*, Sect. XX.

<sup>3</sup> Tidd's Prac. 1134. GIBSON, C. J., *Commonwealth v. Beaumont*, 4 Rawle 366.

<sup>4</sup> *Ruhlman v. Commonwealth*, 5 Binn. 24; *Commonwealth v. Beaumont*, 4 Rawle 366; *Baker v. Williamson*, 2

<sup>5</sup> *Gosline v. Place*, 8 Casey 520.

<sup>6</sup> *Ruhlman v. Commonwealth*, 5 Binn. 24; *Commonwealth v. Beaumont*, 4 Rawle 366.

<sup>7</sup> GIBSON, C. J., *Phila. and Trenton Railroad Co.*, 6 Whart. 41.

<sup>8</sup> *Torr's Appeal*, 1 Rawle 76.

A *certificate from the Nisi Prius* stands upon the same footing as a writ of error, to which it is equivalent.<sup>1</sup> It is taken upon bills of exception, like a writ of error, and brings up the case for review only, not upon the merits. Some conditions as to the issue of it will be noticed hereafter.<sup>2</sup>

The practice in regard to the use of writs of error, *certiorari*, and appeals has been extremely loose, but upon the two former nothing can be reviewed but errors in law on the face of the record, while an appeal brings up the entire case.<sup>3</sup> The distinction, therefore, is important, and the Supreme Court, though lenient to a mistake in the form of remedy, has frequently intimated that its patience in this respect is not inexhaustible. The following are the principal cases in which the proper form has been the subject of decision by the court.

A *writ of error* lies in general upon every judgment at common law. The only cases of difficulty are where the proceedings have been of mixed character, and in these it may be said that the process of review is to be determined by the form which the proceedings have assumed at the time the review is to be had. The judgment of the Common Pleas, therefore, quashing an inquisition in a case of lunacy is to be reviewed on *certiorari*, but judgment after issue on a traverse of the inquisition may be reviewed on writ of error.<sup>4</sup> So error lies to the Common Pleas in a case brought into that court by *certiorari* to two justices under the Act of April 6th 1802;<sup>5</sup> to judgment on the verdict of a jury on an appeal from an inquisition finding damages for taking or injury to property by a corporation under the act incorporating it.<sup>6</sup> And where a court of law directs an issue to inform its conscience, the direction of the issue or the form of it cannot be reviewed in the Supreme Court, but for mistake on the trial of the issue it seems that error will lie.<sup>7</sup> But where the proceedings are *in equity*, and the court awards an issue at law, mistakes in the trial of the issue cannot be reviewed by writ of error. The proper remedy is by appeal from the final decree.<sup>8</sup> The Act of 1836 allows a writ of error on the judgment in a feigned issue to try the right to proceeds of a sheriff's sale; but the better practice is, after decree of distribution, to bring up the whole case by appeal, allowed by the same act;<sup>9</sup> and error sued out before final decree will not receive any favor from the Supreme Court.<sup>10</sup>

*Appeal* lies, on the other hand, from the final decree in chancery on an issue directed to a court of law; and error does not lie for mistakes in the trial of the issue.<sup>11</sup> And under this decision appeal is the proper remedy for errors in the trial of an issue from the Orphans' Court;<sup>12</sup> of a feigned issue to try the right of a removed

<sup>1</sup> Klein v. Franklin Insurance Co., 1 Harris 247; Sergeant v. Ingersoll, 3 Ibid. 343.

<sup>2</sup> Sect. IV., p. 683.

<sup>3</sup> McClemmons v. Graham, 3 Binn. 88.

<sup>4</sup> Commonwealth v. Beaumont, 4 Rawle 366.

<sup>5</sup> Cooke v. Reinhart et al., 1 Rawle 317.

<sup>6</sup> Schaylkill Nav. Co. v. Thoburn, 7

S. & R. 411.

<sup>7</sup> Neff v. Barr, 14 S. & R. 166; Vansant v. Boileau, 1 Binn. 444; Shay v. Henk, 13 Wright 79.

<sup>8</sup> Baker v. Williamson, 2 Barr 116.

<sup>9</sup> Brown's Appeal, 2 Casey 490.

<sup>10</sup> Christophers v. Selden, 4 Casey 165.

<sup>11</sup> Baker v. Williamson, 2 Barr 116.

<sup>12</sup> Commonwealth v. Judges, 4 Barr 301.

assignee for creditors on a claim for advances to the estate;<sup>1</sup> and of a feigned issue to try the validity of a judgment confessed by one who had assigned for creditors.<sup>2</sup> So appeal lies on an application to the equitable powers of a court to set off one judgment against another;<sup>3</sup> on an application by petition for the benefit of the stay of execution under the Act of 1861, in relation to volunteers in the United States service;<sup>4</sup> and by statute in certain cases, such as divorce,<sup>5</sup> judgment on compulsory arbitration under the Act of 16th June 1836,<sup>6</sup> and orders of the Common Pleas on application under the Act of 1783, to remit or moderate the forfeiture of recognisances, but not on judgments in actions on such recognisances, where the remedy is a writ of error.<sup>7</sup>

But *certiorari*, not appeal, is the proper means to review a decree of the Quarter Sessions respecting the expenses of a pauper.<sup>8</sup> So *certiorari* lay to the judgment of the Quarter Sessions upon an appeal by supervisors of roads from a summary conviction by a justice of the peace, the proceedings not having been according to the common law, though there was a trial by jury.<sup>9</sup>

With these distinctions premised, it will be deemed sufficient in the remainder of this chapter to speak of error simply, as including all forms of review, unless special qualification be made.

## SECTION II.

### IN WHAT CASES A REVIEW MAY BE HAD.

#### 1. *Final Judgment.*

A writ of error lies only to a final judgment, or what is equivalent thereto,<sup>10</sup> except in special cases where it is given by statute as on a judgment *quod partitio fiat*.<sup>11</sup> In this respect it differs from a *certiorari*, which lies at any stage of the proceedings. A *certiorari*, however, from the Common Pleas to an alderman or justice of the peace, lies only after judgment. It is therefore in the nature of a writ of error, and will be treated hereafter.<sup>12</sup> A final judgment is such a one as will, if undisturbed, preclude further proceedings in the cause; and the object of the rule is to prevent a multiplication of suits by a removal to the Supreme Court, on suggestion of error, in every stage of the proceedings.<sup>13</sup> A judgment *nisi* therefore is final, though before the expiration of the four days, for the purposes of a writ of error.

<sup>1</sup> *Ingraham v. Caricabura*, 5 Barr 177.

<sup>2</sup> *Johns et al. v. Erb*, Barr 232.

<sup>3</sup> *Horton et al. v. Miller*, 8 Wright 256.

<sup>4</sup> *Breitenbach v. Bush*, 8 Wright 313.

<sup>5</sup> *Miller v. Miller*, 3 Binn. 30; *Allen v. Maclellan*, 2 Jones 328.

<sup>6</sup> *Le Barron v. Harriott*, 2 Pa. R. 154; *Sullivan v. Weaver*, 9 Barr 223.

<sup>7</sup> *Purd. Dig.* 478, pl. 11; *Commonwealth v. Rhoads*, 9 Barr 488.

<sup>8</sup> *Walker Township v. W. Buffalo Township*, 1 Jones 95.

<sup>9</sup> *Ruhlman v. Commonwealth*, 5 Binn. 24.

<sup>10</sup> *Co. Litt.* 288 b.; *Commonwealth v. Common Pleas*, 3 Binn. 273; *Davis v. Barr*, 5 S. & R. 516.

<sup>11</sup> Act of April 5th 1842, § 15, *Pamph. L.* 236, *Purd. Dig.* 409.

<sup>12</sup> *Post*, Sect. XXIII.

<sup>13</sup> *Lewis v. Wallick*, 3 S. & R. 411; 1 *Arch. Pr.* 208.

The following have also been held to be final judgments for purposes of review: An arrest of judgment;<sup>1</sup> an order reducing the amount of judgment;<sup>2</sup> or making an assignment of a judgment against a principal and bail to the sureties of such principal;<sup>3</sup> an order awarding,<sup>4</sup> quashing,<sup>5</sup> or indefinitely staying<sup>6</sup> execution; an order dismissing an appeal from judgment of a justice.<sup>7</sup>

In the Orphans' Court the words of the statute give an appeal from any "definitive sentence or decree," and this expression is somewhat larger than "final judgment." Accordingly it is held that an appeal lies from an order appointing a guardian,<sup>8</sup> an order of sale,<sup>9</sup> and an order of confirmation of any account of an executor, &c., whether final or otherwise.<sup>10</sup>

Error will not lie, however, to the action of the court below, in opening or refusing to open a judgment;<sup>11</sup> or on an order to stay proceedings on a judgment until the determination of a pending proceeding, "subject to such further order of the court as the justice of the case may then require;"<sup>12</sup> an order setting aside a reference and award;<sup>13</sup> a refusal to set aside an execution where nothing on the record showed irregularity;<sup>14</sup> a refusal to appoint auditors on petition by creditors, against the representatives of a trustee of an insolvent;<sup>15</sup> a judgment *quod computet* in an action of account render;<sup>16</sup> a refusal to strike off an appeal from a justice, or from an award of arbitrators;<sup>17</sup> an opinion of a court on a case stated, where it does not appear that any judgment was rendered;<sup>18</sup> a decision upon a plea of *nul tiel record* upon which no judgment had been entered;<sup>19</sup> a judgment, or even a decree in the Orphans' Court, entered *pro forma* and without prejudice, as this is in effect making the Supreme Court a court of primary jurisdiction;<sup>20</sup> a decree of the Orphans' Court ordering a trustee to file an account.<sup>21</sup> And on a motion for summary relief, there is no bill of exceptions to evidence, and therefore no writ of error.<sup>22</sup>

<sup>1</sup> Benjamin v. Armstrong, 2 S. & R. 392; Skinner v. Robeson, 4 Yeates 377.

<sup>2</sup> Fitzgerald v. Caldwell, Add. 119.

<sup>3</sup> Burns v. Huntingdon Bank, 1 Pa. R. 395.

<sup>4</sup> Harger v. Commissioners, 2 Jones 251.

<sup>5</sup> Pontius v. Nesbit, 4 Wright 309.

<sup>6</sup> O'Hara v. Penna. Railroad Co., 2 Grant 241.

<sup>7</sup> Commonwealth v. Common Pleas, 3 Binn. 273; Beale v. Dougherty, Ibid. 436.

<sup>8</sup> Senseman's Appeal, 9 Harris 321.

<sup>9</sup> Hess's Appeal, 1 Watts 255.

<sup>10</sup> Rhoads's Appeal, 3 Wright 186, overruling McGrew's Appeal, 14 S. & R. 396; Walker's Estate, 3 Rawle 243, and Light's Appeal, 10 Harris 445.

<sup>11</sup> Hill v. Irwin et al., 8 Casey 314; Allen v. Meyers, 5 Rawle 335; Kalbach v. Fisher, 1 Ibid. 323; Keim's Appeal, 3 Casey 42; Evans's Adminis-

trator v. Clover, 1 Grant 164; Henry v. Brothers, 12 Wright 71.

<sup>12</sup> O'Hara v. Pennsylvania Railroad Co., 2 Grant 241.

<sup>13</sup> Erie Bank v. Brawley, 8 Watts 530.

<sup>14</sup> Neil v. Tate, 3 Casey 208.

<sup>15</sup> Woolley's Estate, 6 Barr 351.

<sup>16</sup> Beitler v. Zeigler, 1 Pa. R. 135.

<sup>17</sup> Gardner v. Lefevre, 1 Ibid. 73; Kendrick v. Overstreet, 3 S. & R. 357.

<sup>18</sup> Harper v. Roberts, 10 Harris 194.

<sup>19</sup> Taggart v. Cooper, 1 S. & R. 502.

<sup>20</sup> Kerr v. Pittsburgh, 11 Ibid. 359; West's Appeal, 3 Ibid. 92. These decisions are unreversed, but the present practice of the Supreme Court appears to be otherwise.

<sup>21</sup> Eckfeldt's Appeal, 1 Harris 171.

<sup>22</sup> Rogers v. Ratcliffe, 11 Ibid. 184; Colhoun v. Logan, 10 Ibid. 47; Shortz v. Quigley, 1 Binn. 222; Lewis v. Amor, 3 Barr 460; Banning v. Taylor, 12 Harris 289; Lindsley v. Malone, 11

## 2. *Matters of discretion.*

A writ of error does not lie on anything that is matter of discretion in the court below.<sup>1</sup> Therefore, where a case is submitted by agreement of parties to the discretion of the court, no writ of error lies;<sup>2</sup> and where the decision is committed by the law to the discretion of the primary courts, not even consent of parties can give the Supreme Court jurisdiction.<sup>3</sup>

The principal matters that have been held to be within the discretion of the inferior courts, and therefore not reviewable on error, are the allowance or refusal of new trials;<sup>4</sup> and the reasons are not reviewable even though the court files them of record under the Act of February 24th 1806;<sup>5</sup> refusal to take off nonsuit;<sup>6</sup> the supervision of a sheriff's sale and the acknowledgment of his deed;<sup>7</sup>—but in special cases the Supreme Court will review on appeal the action of the Orphans' Court, as to their discretion in setting aside a sale,<sup>8</sup> but a special *allocatur* will be required in such case,<sup>9</sup>—defects of description in a levy;<sup>10</sup> allowing one judgment to be set off against another;<sup>11</sup> the granting or refusing of an issue to inform the conscience of the court;<sup>12</sup> the amount of security for an appeal from a decree of the Orphans' Court;<sup>13</sup> refusal of stay of proceedings in a bail-bond suit, or until payment of costs in a former suit;<sup>14</sup> the question of whether its own rules have been obeyed, as whether the witnesses examined were *going* witnesses as specified in the rule;<sup>15</sup> the amendment of its own records;<sup>16</sup> the allowance or disallowance of change of pleas and other amendments,<sup>17</sup> except amendments amounting to change of form of action,<sup>18</sup> and amendments of right under the Acts of Assembly; and, generally, matters of practice and the control and direction of trial and its incidents, such as the ordering of a cause for trial or continuance;<sup>19</sup> refusal of a continuance on the allowance of an amendment;<sup>20</sup> refusal to postpone the trial of a case until after that of one lower on the list on which it is alleged to depend, unless there is a violation of plain legal

*Ibid.* 24; *Hudson's Appeal*, 3 Casey 46; *McKee v. Sanford*, 1 *Ibid.* 105; *Hill v. Irwin*, 8 *Ibid.* 314; *Bunce v. Wightman*, 5 *Ibid.* 335; *Moyer v. Germantown Railroad Co.*, 3 W. & S. 91.

<sup>1</sup> *Renninger v. Thompson*, 6 S. & R. 1.

<sup>2</sup> *Rogers v. Whiteley*, 2 Wright 137.

<sup>3</sup> *McKee v. Sanford*, 1 Casey 105.

<sup>4</sup> *Werkheiser v. Werkheiser*, 6 W. & S. 184; *Thompson v. Barkley*, 3 Casey 263.

<sup>5</sup> *Burd v. Dansdale*, 2 Barr 80; *Burke v. Young*, 2 S. & R. 389.

<sup>6</sup> *Wallace v. Cooper*, 2 Watts 108.

<sup>7</sup> *Sloan's Case*, 8 *Ibid.* 194; *Rees v. Berryhill*, 1 *Ibid.* 263.

<sup>8</sup> *Huslage's Appeal*, 1 Wright 440.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Donaldson v. Bank of Danville*, 8 Harris 245.

<sup>11</sup> *Wellock v. Cowan*, 16 S. & R. 318;

*Burns v. Thornburgh*, 3 Watts 78.

<sup>12</sup> *Scheetz's Appeal*, 11 Casey 88.

<sup>13</sup> *Koch's Estate*, 4 Rawle 268; *Chew's Case*, 8 W. & S. 375; *Commonwealth v. Judges*, 10 Barr 37.

<sup>14</sup> *Roop v. Meek*, 6 S. & R. 542; *Withers v. Haines*, 2 Barr 435.

<sup>15</sup> *McCormick's Administrator v. Irwin*, 11 Casey 118.

<sup>16</sup> *Commonwealth v. Hultz*, 6 Barr 469.

<sup>17</sup> *Ordronaux v. Prady*, 6 S. & R. 510; *Burk v. Huber*, 2 Watts 306; *Hartman v. Keystone Insurance Co.*, 9 Harris 475.

<sup>18</sup> *Strock v. Little*, 9 Casey 409.

<sup>19</sup> *Porter v. Lee*, 4 Harris 412.

<sup>20</sup> *Tassey v. Church*, 4 W. & S. 141; *Walthour v. Spangler*, 7 Casey 523; *F. & M. Insurance Co. v. Simmons*, 6 Casey 299.



right;<sup>1</sup> allowance or refusal of a discontinuance;<sup>2</sup> the order of addressing the jury;<sup>3</sup> the course of examination of witnesses;<sup>4</sup> the order of evidence, such as the introduction of rebutting testimony, the reading of a deed before proof of its execution, &c.;<sup>5</sup> the introduction of new evidence after parties have closed;<sup>6</sup> the number of concurrent witnesses a party will be allowed to examine on one point;<sup>7</sup> the decision on an application to discharge a jury during a trial;<sup>8</sup> allowing papers to go out with the jury;<sup>9</sup> irregularities in the conduct of the jury;<sup>10</sup> putting into form and amending verdicts;<sup>11</sup> whether a party was misled by misnomer of place of taking depositions;<sup>12</sup> and an exception to the jurisdiction of a judge on account of interest under the acts providing for special courts.<sup>13</sup> Whether the decision of the court below upon the sufficiency of the proof of a witness's inability to attend, so as to allow his deposition to be read, is reviewable or not, is a question of some doubt. The later cases appear to affirm that it is.<sup>14</sup>

### 3. *Specific statutory regulations.*

In addition to these general rules, there are special cases in which the decision of the lower court is made final by statute, such as the decision of the Common Pleas on *certiorari* to an alderman;<sup>15</sup> or in a contested election of prothonotary.<sup>16</sup> And from the action of the court in which an execution issues against a life estate, in appointing or refusing to appoint a sequestrator under the Act of 1840,<sup>17</sup> no appeal is given by the statute.<sup>18</sup>

## SECTION III.

### FOR WHOM ERROR LIES.

By the Act of 22d May 1722,<sup>19</sup> a writ of error is given to any one who "shall find himself aggrieved with the judgment." And by the Act of 22d March 1850,<sup>20</sup> either party may have a writ after

<sup>1</sup> Postens v. Postens, 3 W. & S. 182.

<sup>2</sup> Evans's Administrator v. Clover, 1 Grant 164.

<sup>3</sup> Richards v. Nixon, 8 Harris 19; Commonwealth v. Contner, 9 Ibid. 274; Hartman v. Keystone Insurance Co., 9 Ibid. 474.

<sup>4</sup> Schnable v. Doughty, 3 Barr 395.

<sup>5</sup> Helfrich v. Stem, 5 Harris 152; Garrigues v. Harris, Ibid. 344; Lauchner v. Rex, 8 Ibid. 464; Breinig v. Meitzler, 11 Ibid. 160; Salmon v. Rance, 3 S. & R. 314; Irish v. Smith, 8 Ibid. 573; Harden v. Hays, 2 Harris 95.

<sup>6</sup> Hake v. Fink, 9 Watts 339; Frederick v. Gray, 10 S. & R. 182; Barnhart v. Pettit, 10 Harris 139; Moloney v. Davis, 12 Wright 512.

<sup>7</sup> Jatho v. G. & C. Pass. Railway Co., 4 Phila. Rep. 24.

<sup>8</sup> Evans v. Mengel, 3 Barr 239.

<sup>9</sup> Spence v. Spence, 4 Watts 165.

<sup>10</sup> 1 Peters 159.

<sup>11</sup> Keen v. Hopkins, 12 Wright 445.

<sup>12</sup> Gibson v. Gibson, 8 Harris 11.

<sup>13</sup> Philadelphia Library Co. v. Ingham, 1 Whart. 72.

<sup>14</sup> Dennison v. Fairchild, 7 Watts 309; Beitler v. Study, 10 Barr 418; Dietrich v. Dietrich, 1 Pa. R. 318, 320; Pipher v. Lodge, 16 S. & R. 220; Vincent v. Huff, 8 Ibid. 387; Parks v. Dunkle, 3 W. & S. 293; Porter v. Wilson et al., 1 Harris 648.

<sup>15</sup> Cozens v. Dewees, 2 S. & R. 112; Johnson v. Hibbard, 3 Whart. 12; Borland v. Ealy, 7 Wright 111.

<sup>16</sup> Carpenter's Case, 2 Harris 486.

<sup>17</sup> Pamph. L. 3, Purd. Dig. 443, pl. 81.

<sup>18</sup> Lefever v. Witmer, 10 Barr 505; Lancaster Bank v. Stauffer, 10 Ibid. 398.

<sup>19</sup> 1 Sm. Laws 138, Purd. Dig. 409.

<sup>20</sup> Pamph. L. 230, Purd. Dig. 410.

decision upon a writ taken by the other. Where both parties take writs on the same grounds and the judgment is reversed on one, the other will be abated;<sup>1</sup> but not where the errors assigned are different.<sup>2</sup> But the same party can have only one writ to the same judgment. Therefore, after affirmance and remitter of record, a second writ will not lie to the taxation of costs. A party desiring his whole case reviewed, must see that his writ of error does not issue prematurely.<sup>3</sup>

The writ is usually brought by the party against whom the judgment is given, but it may be brought by the plaintiff to reverse his own judgment, if erroneous, to enable him to bring another action.<sup>4</sup> But no party can bring it contrary to his agreement express or implied.<sup>5</sup> Therefore, where a case stated is submitted to the court below, error does not lie unless the right be expressly reserved;<sup>6</sup> and a submission under agreement to arbitration to make award subject to the opinion of the court, is in the nature of a case stated, on which error will not lie.<sup>7</sup> And issuing execution and receiving the amount of his judgment by a plaintiff, is a waiver of his right to a writ of error.<sup>8</sup> So an executor cannot have a writ of error to a *sci. fa.* against him, when the testator had agreed not to bring one on the original suit.<sup>9</sup> But entering security for stay of execution is not a waiver of right to bring error;<sup>10</sup> nor an agreement to the entry of a judgment without prejudice to the rights of defendant.<sup>11</sup>

As a general rule a writ of error lies only for a party or privy to the record, or one who is *aggrieved* by the judgment. Third persons are not bound by the judgment.<sup>12</sup> An executor or administrator, however, may have a writ of error on a judgment against his testator or intestate,<sup>13</sup> and even an appeal from a decree of distribution of the balance of the estate in his hands.<sup>14</sup> And an assignee for benefit of creditors may bring error by Act of 13th June 1840, § 9.<sup>15</sup> So, also, a terre-tenant may sue the writ in his own name without joining the legal parties, but the record to be removed must be truly described in the body of his writ.<sup>16</sup> The surety of an administrator may appeal from a decree of the Orphans' Court against him;<sup>17</sup> and may have a bill of review under the Act of 13th October 1840.<sup>18</sup>

Where there are several plaintiffs they must all join in a writ of

<sup>1</sup> Wormcastle v. Negley, MS., Purd. Dig. 410, n. (a).

<sup>2</sup> Ormsby v. Ihmsen, 10 Casey 462.

<sup>3</sup> Gibson v. Cummings, 1 Ibid. 231.

<sup>4</sup> 3 Burr. 1772.

<sup>5</sup> Smith v. Commonwealth, 14 S. & R. 69; except in capital criminal cases, Ibid.

<sup>6</sup> Knisely v. Shenberger, 7 Watts 193; Fuller v. Trevor, 8 S. & R. 529; Commonwealth v. Thum, 10 Ibid. 418; Cuncle v. Dripps, 3 Pa. R. 291.

<sup>7</sup> Fuller v. Trevor, 8 S. & R. 529; Wilson v. Commonwealth, 3 Pa. R. 531.

<sup>8</sup> Laughlin v. Peebles, 1 Pa. R. 114; Smith v. Jack, 2 W. & S. 101.

<sup>9</sup> Wright v. Nutt, 1 Term 388.

<sup>10</sup> Ranck v. Becker, 12 S. & R. 412.

<sup>11</sup> Weidner v. Mathews, 1 Jones 336.

<sup>12</sup> 2 Saund. 45, n. 6, 101 e; Hylton v. Brown, 1 W. C. C. R. 343; Steel v. Bridenbach, 7 W. & S. 150; Morris v. Garrison, 3 Casey 226.

<sup>13</sup> Com. Dig. "Plead.," 3 Barr 9.

<sup>14</sup> Koch's Estate, 4 Rawle 338.

<sup>15</sup> Pamph. L. 691, Purd. Dig. 61, pl. 14.

<sup>16</sup> Finney v. Crawford, 2 Watts 294.

<sup>17</sup> Garber v. Commonwealth, 7 Barr 265.

<sup>18</sup> Pamph. L. 1, Purd. Dig. 769, pl. 48; Bishop's Estate, 10 Barr 469.

error, and the dissent or release of one is a bar to the prosecution of the writ by the others. But when defendants bring the writ it is to discharge themselves from the judgment, and there is therefore no joint right.<sup>1</sup> But the writ must be brought in the name of all the defendants, if they are all living and aggrieved by the judgment; and if any of them refuse to join in the prosecution, they must be summoned to the court of error, and severed; after which, they never again can maintain a writ of error, but he who sued out the writ may go on alone. It does not appear that the process of summons and severance has ever been used in the Supreme Court. It is probable that that court would proceed in a less formal way, by laying a rule on those persons named as plaintiffs in the writ of error and not appearing, either to appear and join in the prosecution, or submit to be severed.<sup>2</sup> If the writ be brought by one or more only of the defendants it may be quashed;<sup>3</sup> or the court will give the plaintiff leave to take out execution.<sup>4</sup> But if one or more of the defendants be dead, the survivors may bring the writ in their own names.<sup>5</sup> So, if there be a *nolle prosequi* as to one of the defendants or judgment in his favor, he shall not join in the writ of error.<sup>6</sup> And where a writ against three was returned served as to one only, and the judgment was obtained generally against the three, a writ of error by the two not served was sustained after the limitation had expired as to the one served.<sup>7</sup>

## SECTION IV.

## TIME WITHIN WHICH ERROR MUST BE TAKEN.

No judgment can be reversed unless the writ of error be obtained within seven years after entry of judgment, unless the party entitled to the writ be prevented from issuing it by infancy, coverture, imprisonment, insanity, or being out of the limits of the United States, in which case he has five years after the disability has ceased in which to bring his writ;<sup>8</sup> and a *certiorari* is within the act.<sup>9</sup> Where, however, the judgment is not merely erroneous but void on its face, execution issued on it will be set aside on a writ of error, more than seven years after the entry of the judgment.<sup>10</sup>

The period of limitation runs from the time the party was legally bound to take notice of the judgment.<sup>11</sup> The proper course when a writ of error is too late is, not to quash the writ, but disregard the assignment of error.<sup>12</sup>

An appeal from a decree of the Orphans' Court must be brought

<sup>1</sup> *Gallagher v. Jackson*, 1 S. & R. 493. R. 429.

<sup>2</sup> *Fotterall v. Floyd*, 6 *Ibid.* 320.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Barnes* 262.

<sup>5</sup> *Palm*. 151; 1 *Str.* 234.

<sup>6</sup> *Fotterall v. Floyd*, 6 S. & R. 320;

*Verelst v. Rafnel*, *Cowp.* 425.

<sup>7</sup> *Brown v. Kelso's Executors*, 2 Pa.

<sup>8</sup> Act of 13th April 1791, 3 Sm. Laws 34; *Purd. Dig.* 410, pl. 7.

<sup>9</sup> *Young's Petition*, 9 Barr 215.

<sup>10</sup> *Brown v. Kelso's Executors*, 2 Pa.

R. 429.

<sup>11</sup> *Camp v. Welles*, 1 Jones 206.

<sup>12</sup> *Ibid.*

within three years,<sup>1</sup> and bill of review of a decree on an account of an executor, guardian, &c., must be brought within five years.<sup>2</sup> This, however, applies only to review of errors in accounts of executors, &c.; and there is no definite time within which a bill of review for other matters must be brought, unless one shall be hereafter adopted in analogy to the limitation for writ of error.<sup>3</sup>

Where, however, on appeal, the decree has been affirmed and the record remitted to the court below, a bill of review does not lie in either court; for the court below cannot review the decree of the Supreme Court, and the latter having remitted the record, has nothing in its possession to review.<sup>4</sup>

A certificate from the *Nisi Prius*, though in the nature of a writ of error, must be taken before the next term of the Supreme Court; but it is in time if taken before ten o'clock of the first day of the term.<sup>5</sup> And to be a *supersedeas*, it must be taken and perfected within twenty-one days after the judgment.<sup>6</sup> In a special case, however, leave will be given to file an order *nunc pro tunc*, after the commencement of the next term.<sup>7</sup>

Though a writ of error may issue as above stated, within seven years from the judgment, yet to save costs, and avoid the enforcement of an execution, it should be taken out before the limitation against the issue of execution expires, which is discussed in the next section.

## SECTION V.

### THE PRELIMINARIES AND THE ISSUE OF THE WRIT.

A writ of error in a civil action is a writ of right, and is issued of course by the prothonotary of the Supreme Court upon a *præcipe*. The *præcipe* should be full and definite, naming the court from which the record is to be removed, the parties, number, and term of the action below, and the parties to the writ of error.<sup>8</sup> The writ is tested and made returnable to the court as other writs, and is directed to the judges of the court in which the judgment has been rendered, commanding them that if judgment be rendered, then the record and process and all things touching the same, under their seal distinctly and openly they have before the justices of the Supreme Court on the next return day, together with the writ itself; that the record and process being inspected, they may further cause to be done what of right and according to the laws and customs ought. The allowance of one of the justices of the Supreme Court is also marked on it by the prothonotary. This is merely formal, and if omitted will be allowed, *nunc pro tunc*, on objection made.<sup>9</sup> In some cases, however, a special *allocatur* is necessary as to a

<sup>1</sup> Act of 29th March 1832, Pamph. L. 213; Purd. Dig. 769, pl. 49.

<sup>2</sup> Act of 13th October 1840, Pamph. L. 1; Purd. Dig. 769, pl. 48; Weiting v. Nissley, 6 Barr 141.

<sup>3</sup> George's Appeal, 2 Jones 260.

<sup>4</sup> Dennison v. Goehring, 6 Barr 402.

<sup>5</sup> Act of 26th July 1842, § 6, Pamph.

L. 431; Purd. Dig. 930, pl. 42; Dawson v. Ryan, 4 W. & S. 403.

<sup>6</sup> Ibid.

<sup>7</sup> Catherwood v. Konn, 2 Barr 341.

<sup>8</sup> Summerville v. Painter, 8 Wright 112.

<sup>9</sup> Eckart v. Wilson, 10 S. & R. 53; Young's Petition, 9 Barr 215.

*certiorari* from the Supreme Court to a justice of the peace where the Common Pleas have concurrent jurisdiction,<sup>1</sup> or a *certiorari* to remove a road case in Philadelphia county;<sup>2</sup> and to an appeal from a decree of the Orphans' Court setting aside or refusing to set aside a sale.<sup>3</sup> A *certiorari* at common law, after judgment, not being of right, may be allowed upon conditions, and after allowance the *allocatur* may be revised so as to add conditions.<sup>4</sup>

By the Act of 11th March 1809, § 6,<sup>5</sup> the plaintiff in error, or party purchasing the writ, must make oath or affirmation, to be filed with the record, that it is not intended for delay. This may be made by an agent or attorney,<sup>6</sup> before the prothonotary of either the Supreme or the lower court,<sup>7</sup> or any officer having a general power to administer oaths. It may be made before the trial,<sup>8</sup> and must be made before the writ issues and the record is returned.<sup>9</sup> And it must be made by administrators, &c., as well as by parties.<sup>10</sup>

Where the plaintiff in error is a corporation the oath must be made by the president or other chief officer, or, in his absence, by the cashier, treasurer, or secretary;<sup>11</sup> but a corporation is within the Act of 1832, allowing the affidavit to be made by an agent, and he needs not be specially deputed.<sup>12</sup>

The Act of 1809 requiring an affidavit, speaks of writs of error and appeals in the "proper district," but the court, in urgent and especially in public cases where justice requires it, will hear a case out of its proper district, and in such cases a special *allocatur* is necessary.<sup>13</sup>

## SECTION VI.

### BAIL IN ERROR.

By the Act of 16th June 1836, § 7,<sup>14</sup> execution shall not be stayed upon any judgment in any civil action or proceeding, by reason of any writ of error from the Supreme Court to any other court of this Commonwealth, unless the plaintiff in such writ, or some one in his behalf, with sufficient sureties, shall become bound by recognisance to the party in whose favor such judgment shall be given, with condition to prosecute such writ of error with effect, and if the judgment be affirmed, or the writ of error be discontinued or *non prossed*, to pay the debt, damages, and costs (as the case may be) adjudged or accruing upon such judgment, and all other damages and costs that

<sup>1</sup> *Scully v. Commonwealth*, 11 Casey 513.

<sup>2</sup> Road from Thomas's Creek, 3 Wh. 11.

<sup>3</sup> *Haslage's Appeal*, 1 Wright 440.

<sup>4</sup> *Ewing v. Thompson*, 7 Ibid. 379.

<sup>5</sup> 5 Sm. Laws 17; *Purd. Dig.* 410, pl. 8.

<sup>6</sup> Act of 11th June 1832, § 3, *Pamph. L.* 611; *Purd. Dig.* 411, pl. 11; Act of 27th March 1833, § 2, *Pamph. L.* 99; *Purd. Dig.* 411, pl. 12.

<sup>7</sup> Act of 23th April 1850, § 29, *Pamph. L.* 574; *Purd. Dig.* 411, pl. 13.

<sup>8</sup> *Miles v. O'Hara*, 1 S. & R. 38.

<sup>9</sup> *Beale v. Patterson*, 6 Ibid. 89.

<sup>10</sup> Ibid.

<sup>11</sup> Act of 22d March 1817, § 4, 6 Sm. Laws 439; *Purd. Dig.* 410, pl. 13.

<sup>12</sup> *Academy of Fine Arts v. Power*, 2 Harris 442.

<sup>13</sup> *Hazen v. Commonwealth*, 11 Ibid. 362; *Ewing v. Filley et al.*, 7 Wright 387.

<sup>14</sup> *Pamph. L.* 762, *Purd. Dig.* 411, pl. 14.

may be awarded upon such writ of error. But executors, administrators, guardians, assignees in voluntary assignments for benefit of creditors, or any other person suing or defending in a representative character, are excepted.<sup>1</sup> And an appeal by an executor from the judgment of the *Nisi Prius* is within the exception.<sup>2</sup> A judgment, however, against an executor *de bonis propriis* is not within the act.<sup>3</sup>

These provisions are copied from the English statutes of 3 Jac. 1, ch. 8,<sup>4</sup> 13 Car. 2, st. 2, ch. 2, s. 9,<sup>5</sup> and 16 & 17 Car. 2, ch. 8, s. 3,<sup>6</sup> all of which are in force in Pennsylvania, and may be resorted to for interpretation, or to supply any *casus omissus* in our own statute.<sup>7</sup>

The Act of 1836 further provides<sup>8</sup> that if the writ of error be issued, served, and bail be entered as aforesaid within three weeks from the day on which judgment shall be entered, the execution shall be stayed and superseded upon the payment of costs, although the service or execution thereof shall have begun, and if it shall have been fully executed, the defendant may have from the court which issued it a writ of restitution of the proceeds thereof, as the case may require.

Where there is a judgment for the defendant and a certificate by the jury of plaintiff's indebtedness to him, the plaintiff on taking a writ of error must give security for double that amount as if it were a judgment.<sup>9</sup>

On certificate from the *Nisi Prius* the security required<sup>10</sup> is absolute for payment of all damages and costs; and this includes the amount of judgment in debt or *assumpsit*, as well as technical damages.<sup>11</sup> And it is not a *supersedeas* unless taken and perfected within twenty-one days after judgment.

When a corporation (*municipal excepted*) takes a writ of error, the bail requisite is bail absolute for the payment of debt, interest, and costs on affirmation of the judgment.<sup>12</sup> But a corporation (except foreign), like other persons, may take out a writ without giving bail, but it will not be a *supersedeas*.<sup>13</sup> But by Act of 21st March 1849,<sup>14</sup> judgment or award against a foreign corporation is final and conclusive, unless bail be entered in the nature of bail absolute for payment of such sum as shall be *finally* adjudged due to plaintiff, with interest and costs.

The *Recognisance* is directed by rule 4 of the Supreme Court to be plainly drawn and engrossed on parchment or paper in the following form, or as near as may be: "—— county, to wit: You

<sup>1</sup> Act 16th June 1836, § 8, Pamph. L. 1149; 1 Arch. Pr. 221.

762; Act of 13th June 1840, § 10, Pamph. L. 692; Purd. Dig. 411, pl. 15, 16.

<sup>2</sup> Maule v. Shaffer, 2 Barr 404.

<sup>3</sup> 1 Sid. 368; 1 Lev. 245.

<sup>4</sup> Made perpetual by 3 Car. 1, c. 4, s. 4; Rob. Dig. 245.

<sup>5</sup> Rob. Dig. 137.

<sup>6</sup> Made perpetual by 22 & 23 Car. 2, c. 4; Rob. Dig. 41.

<sup>7</sup> For the English practice, see 2 Tidd

<sup>8</sup> Sect. 8, Pamph. L. 762; Purd. Dig. 411, pl. 15.

<sup>9</sup> Churchman v. Parke, 2 Barr 406.

<sup>10</sup> Act of 26th July 1842, § 5, Pamph. L. 431; Purd. Dig. 930, pl. 42.

<sup>11</sup> Dawson v. Ryan, 4 W. & S. 403.

<sup>12</sup> Act of 15th March 1847, § 1, Pamph. L. 361; Purd. Dig. 411, pl. 17.

<sup>13</sup> Savings Ins. v. Smith, 7 Barr 291.

<sup>14</sup> Sect. 3, Pamph. L. 216; Purd. Dig. 199, pl. 31.

severally acknowledge to owe (the plaintiff in the action) the sum of (double the sum recorded), upon the condition that A. B. prosecute his writ of error with effect, and if judgment be affirmed, that he satisfy and pay the debt, damages, and costs recovered, together with such costs as shall be awarded by occasion of delay of execution, or else you will do it for him." It may be taken before any of the judges of the court from whose judgment or decree the writ of error is taken, and must be duly certified and transmitted with the record.<sup>1</sup> It may also be taken in the Supreme Court by one of the judges, or by the prothonotary or a commissioner of bail.<sup>2</sup>

*Two sureties* are required to make the recognisance a *supersedeas*.<sup>3</sup>

*Amendment* of the recognisance will sometimes be permitted, even after judgment has been affirmed, such as adding the name of cognisor and altering that of cognisee.<sup>4</sup>

*Notice of the entering of bail in error* should be immediately given to defendant in error or his attorney, though it is not necessary,<sup>5</sup> who then has, by section 2 of Rule 4 of the Supreme Court, twenty days within which to except to the sufficiency of the bail, and on his exception the plaintiff in error must either put in new bail or the old bail must justify within ten days, in default whereof the prothonotary shall *non pros.* the writ of error.<sup>6</sup> Justification may be made before the prothonotary, but if the court is sitting it would be more prudent to make it before the court.

*The oath and recognisance may be waived by the defendant in error*, being intended for his benefit, to prevent delay. Therefore his exception ought to be taken before doing any act which can be considered as admitting the writ to be well in court, and therefore impliedly waiving his objections.<sup>7</sup>

*Bail are liable* when the writ is *non prossed* by agreement,<sup>8</sup> but not where the *non pros.* is entered by the court under Rule 4, for failure to justify.<sup>9</sup> And bail cannot discharge themselves by surrendering the plaintiff in error, and therefore are not entitled to relief, should he become insolvent pending the writ of error.<sup>10</sup>

## SECTION VII.

### SUPERSEDEAS.

A writ of error, perfected by entering bail, becomes a *supersedeas* of execution from the time of the delivery of the writ to the prothonotary of the court below;<sup>11</sup> and for the purpose of *supersedeas*, the allowance of the writ is notice of itself.<sup>12</sup>

<sup>1</sup> Act 11th March 1809, § 7, 5 Sm. Laws 17; Purd. Dig. 410, pl. 9.

<sup>2</sup> Smith v. Ramsay, 6 S. & R. 574; Act of 14th April 1834, § 10, Pamph. L. 342; Purd. Dig. 927, pl. 10.

<sup>3</sup> Henry v. Boyle, 1 Miles 386; Rheem v. Naugatuck Co., 9 Casey 356.

<sup>4</sup> Welch v. Vanbebber, 4 Yeates 559.

<sup>5</sup> Commonwealth v. McAllister, 1 Watts 308.

<sup>6</sup> See Taggart v. Cooper, 3 Binn. 34; Campbell v. Gregg, Bright. Rep. 440.

<sup>7</sup> Heckert's Appeal, 13 S. & R. 104.

<sup>8</sup> Share v. Hunt, 9 Ibid. 404.

<sup>9</sup> Tilden v. Worrell, 6 Casey 272.

<sup>10</sup> Smith v. Ramsay, 6 S. & R. 576; 1 Term R. 624.

<sup>11</sup> Frantz v. Kaser, 3 S. & R. 395.

<sup>12</sup> 2 Tidd 1145.

By the Act of 11th March 1809,<sup>1</sup> "no execution shall issue upon any judgment, on any special verdict, demurrer, or case stated, unless by leave of the court, in special cases for security of the demand, within three weeks from the day on which such judgment shall be pronounced."<sup>2</sup> Upon judgments on general verdicts, four days must elapse before execution can be sued out, which is the time within which a motion for a new trial, or in arrest of judgment, must be made,<sup>3</sup> and during these times, respectively, writs of error ought to be taken, and bail given, else execution may be issued and levied, and the defendant thus subjected to costs; though if the writ be taken within three weeks, it is still a *supersedeas* under the Act of 1836 as stated in the preceding section.

And the writ is a *supersedeas* if served before execution levied, although after the three weeks allowed by the Act of 1836. In such case the law remains as it was prior to that enactment; that is, so long as execution is not *executed* the writ of error on which bail has been duly entered is a *supersedeas*.<sup>4</sup> A *fi. fa.* is executed so far as not to be superseded, when it is *levied*;<sup>5</sup> yet even here it is said, if the case required it, the money levied by the execution will be retained in court till the determination of the writ of error.<sup>6</sup> And when there has been a *fi. fa.* and condemnation, and a *vend. exp.*, but no sale, a writ of error is not a *supersedeas*.<sup>7</sup> And in proceedings between landlord and tenant in the Common Pleas, a writ of error or *certiorari* is never a *supersedeas*.<sup>8</sup>

<sup>1</sup> Sect. 6, 5 Sm. Laws 17, Purd. Dig. 410, pl. 8.

<sup>2</sup> The 6th section of the Act of 16th June 1836, Pamph. L. 762, was intended as a substitute; but by a clerical error in drafting, the bill has been rendered unintelligible.

<sup>3</sup> *Ante*, p. 624.

<sup>4</sup> *Bryan v. Comly*, 2 Miles 271; *Adams v. Hindman*, *Ibid.* 464.

<sup>5</sup> *Patterson v. Juvenal*, D. C., December 9th 1848. Why the *fi. fa.* should not be set aside. *Per curiam*. A writ of error was issued in this case on the 6th October, and bail in error given. On the 9th October it was filed in the office. On the same day a *fi. fa.* was issued. Whether it was placed in the sheriff's hands before or after the writ of error was lodged in the office, does not appear, nor do we consider it material. On the 24th November, notice was given to defendant that the sheriff had levied on his real estate, when the present rule was taken.

This court has decided, in *Bryan v. Comly*, 2 Miles 271, and *Adams v. Hindman*, *Ibid.* 464, that a writ of error, on which bail has been duly entered and served at any time before execution issued, or if issued before it is *executed* (which, it is said in the case of a *fi. fa.*, is so considered if *levied*), is a *super-*

*sedeas*. It is argued, however, in this case, that, as the judgment was a lien, the delivery to the sheriff is to be considered as *ipso facto* as a levy on real estate. And the case of *Wood v. Calvin*, 5 Hill 228, is cited to that effect. However it may be in the State of New York, it is clear that it cannot be so considered in Pennsylvania; for, by the 43d section of the Act of 13th June 1836, Purd. Dig. 447, it is provided that, "If sufficient personal estate cannot be found by such officer, he shall proceed to levy upon the defendant's real estate, or such part thereof as he may deem sufficient to pay the sum to be levied." It is evident that no levy had been made at the time the writ of error in this case was lodged in the office; for on the 4th November a rule was applied for "to grant the sheriff four weeks to levy on real estate," which, though inartificially worded, was evidently intended and allowed as an enlargement of the time of making his return to enable him to make a levy on real estate. Rule absolute.

<sup>6</sup> *Kirk v. Eaton*, 10 S. & R. 108, citing 2 Saund. 101 b, Willes 271.

<sup>7</sup> *Bozarth v. Marshall*, 1 Phila. Rep. 172, 8 Leg. Int. 50.

<sup>8</sup> *Grubb v. Fox*, 6 Binn. 460.



A second writ of error is not a *supersedeas* of execution, although bail be given, if the first writ abated by act of the party, as by *non pros.*—but otherwise when it abates by the act of God.<sup>1</sup>

If the writ be taken without bail, or if the recognisance be defective, it is no *supersedeas*; and the defendant in error may issue execution or a *sci. fa.* to revive the judgment.<sup>2</sup> But the cause is well removed, and the parties must proceed on the writ of error.<sup>3</sup> But where bail is defectively entered and the defendant in error excepts, the writ must be *non prossed* on failure to justify, in accordance with Rule IV. as already said.<sup>4</sup>

By the English practice, on application to the court by proper affidavit of circumstances, leave may be given to defendant in error to take out execution notwithstanding the issue of the writ and entering bail.<sup>5</sup> It does not appear that this practice has obtained in Pennsylvania, but it might be resorted to if a proper case should arise.

## SECTION VIII.

### THE RETURN OF THE WRIT.

When the writ of error is allowed and filed with the prothonotary of the court by which the judgment was rendered, he returns it to the prothonotary of the Supreme Court, together with the whole record, including the original *præcipe*, which constitutes a portion of it. With us, the entire record is uniformly in the custody of the prothonotary of each court, and not in the keeping of the judges.<sup>6</sup> It is the duty of the plaintiff in error to see that the record is returned in due time. And if he makes default, the defendant in error may, after the return day, move for a rule upon him to return the record on or before a certain day, or *non pros.*; a reasonable time (usually four days) is allowed for this purpose. In order more effectually to expedite the decision of causes in the Supreme Court, the prothonotary is directed by court rule, to enter *non pros.*, according to the rule in all cases of writs of error where the record is not returned on or before the first return day of the second term after the *teste* of the writ: which *non pros.* shall not be taken off by consent of parties. July is, however, not considered a term within this rule.

In appeals, where the appellant neglects to bring up the record at the next term of the court after the appeal is taken, any of the other parties interested may bring it up, and have the case determined *ex parte*, or the appeal dismissed at the costs of the appellant.<sup>7</sup>

<sup>1</sup> Sheerer v. Grier, 3 Whart. 14;  
Power v. Frick, 2 Grant 306.

<sup>2</sup> Boyer v. Rees, 4 Watts 205.

<sup>3</sup> Magill v. Kauffman, 4 S. & R. 318.

<sup>4</sup> *Ante*, p. 686.

<sup>5</sup> See 2 Tidd's Prac. 1147.

<sup>6</sup> Fitzsimons v. Salomon, 2 Binn. 439.

<sup>7</sup> Rule of Supreme Court. Walker's

## SECTION IX.

## AMENDMENT, AND QUASHING THE WRIT.

When the writ is returned, but not before,<sup>1</sup> the plaintiff in error may move to amend, or the defendant in error to quash or *non pros.* the writ; or it may abate, or be discontinued.<sup>2</sup>

Formerly, great certainty was required in making the writ agree with the record, nor could any defects therein be amended before the 5 Geo. I. c. 13, reported to be in force in Pennsylvania,<sup>3</sup> because, by the former statutes of amendment, the judges were only enabled to amend in affirmance of the judgment.<sup>4</sup> Upon this statute, it has become the practice to amend the writ of error, as a matter of course, without costs.<sup>5</sup> And it has been amended by striking out the name of one of the plaintiffs in error.<sup>6</sup> In the latter case, however, the recognisance of bail in error must also be amended.<sup>7</sup> And a blank left in the writ for the month in which the court is to be held is a mere clerical error and amendable.<sup>8</sup> So the description of the parties in the writ may be amended by the record.<sup>9</sup> But where there were several plaintiffs or defendants, and the writ is brought by one only, it cannot be amended by adding the others.<sup>10</sup> And where a writ of error was returnable before the giving of the judgment on which it was brought, this was held to be such a fault as was not amendable under the statute.<sup>11</sup>

*Quashing.*—Any defect in the writ which is not amendable is a ground for quashing it on motion; and where there is no jurisdiction, as if the proper record is not brought before the court,<sup>12</sup> or the judgment of the court below is final by law;<sup>13</sup> or where the justice of the case requires it;<sup>14</sup> or where a case stated or special verdict is so defective that no means are furnished for determining what judgment should be given,<sup>15</sup> the court will quash of its own motion.

Where the object is to bar a writ of error by matters of fact not appearing on the record returned, they should be brought before the court by plea or by motion to quash.<sup>16</sup> Thus, where the plaintiff has waived his right to a writ of error, expressly or impliedly, as by suing out execution and receiving the amount of his judgment, the writ will be quashed;<sup>17</sup> and this may be done *before the return day of the writ.*<sup>18</sup>

<sup>1</sup> 1 Caines 251.

<sup>2</sup> If a plaintiff withdraws his writ, and has an entry of withdrawal made on the docket, is it not a *retraxit* which bars another writ? *Laughlin v. Peebles* 1 Pa. R. 114.

<sup>3</sup> Rob. Dig. 48.

<sup>4</sup> 2 Bac. Abr. 463.

<sup>5</sup> Str. 863, 902.

<sup>6</sup> Ibid. 683, 892; Cowp. 425.

<sup>7</sup> 2 W. Bl. 1067; see 5 Taunt. 86.

<sup>8</sup> *Reed v. Collins*, 5 S. & R. 352.

<sup>9</sup> *Finney v. Crawford*, 2 Watts 294.

<sup>10</sup> *Fotterall v. Floyd*, 6 S. & R. 320,

*ante*, p. 681.

<sup>11</sup> Str. 807, 891; and see 1 Arch. Pr. 214, 215; 2 Dunl. Pr. 1142.

<sup>12</sup> *Specht v. Commonwealth*, 12 Harris 105.

<sup>13</sup> *Johnson v. Hibbard*, 3 Whart. 12; *Cozens v. Dewees*, 2 S. & R. 112.

<sup>14</sup> *Downing v. Baldwin*, 1 Ibid. 299.

<sup>15</sup> *Commonwealth v. Smith*, 8 Harris 104.

<sup>16</sup> *Showers v. Showers*, 3 Casey 431.

<sup>17</sup> *Laughlin v. Peebles*, 1 Pa. R. 114.

<sup>18</sup> *Davis v. Hood*, 1 Harris 171.

The question whether the writ has been properly sued out, or whether it lies in the particular case, belongs exclusively to the court from which it issues, on a motion made to quash; and where the motion to quash is too late, as if made after plea of *in nullo est erratum*, and issue joined, the court will if injustice be likely to be done quash of its own accord.<sup>1</sup> It will not be quashed, however, if not returned to the term to which it was made returnable, because by long-established practice, returns of writs of error have been received after the time to which they were returnable;<sup>2</sup> and where it is returned in the usual form, the court will presume that it was presented during the sitting of the court to which it was directed, and by them properly returned.<sup>3</sup> And, where the writ was regularly issued but served after the return day, the court will not quash it, but will order a *remittitur* if moved for.<sup>4</sup> But where the court below struck off an appeal but afterwards reinstated it, the writ was quashed as there was no final judgment to which it could lie.<sup>5</sup> Where the record is legally removed, but the writ has been taken after the period of limitation has expired, the proper course is not to quash it, but to disregard the assignment of errors and affirm the judgment.<sup>6</sup>

## SECTION X.

## ABATEMENT.

The writ abates by the death of the plaintiff in error, or of any one of the plaintiffs, before errors assigned.<sup>7</sup> And the defendant may thereupon sue out a *scire facias quare executionem non*, to revive the judgment against the executors or administrators of the plaintiff in error; but if the plaintiff die after errors assigned, it does not abate the writ. In such case, the defendant having joined in error, may proceed to get the judgment affirmed, if not erroneous; but must then revive it against the representatives of the plaintiff in error.<sup>8</sup> And in no case does the writ abate by the death of the defendant in error; the action is proceeded in as if he were alive,

<sup>1</sup> Downing v. Baldwin, 1 S. & R. 298.

<sup>2</sup> Gailey v. Beard, 4 Yeates 418.

<sup>3</sup> Ibid.

<sup>4</sup> Jones v. Schock, S. C. 1819, Wh. Dig. tit. "Error," pl. 499.

<sup>5</sup> Straub v. Smith, 2 S. & R. 382.

<sup>6</sup> Camp v. Welles, 1 Jones 206.

<sup>7</sup> Boas v. Heister, 3 S. & R. 271; 2 Saund. 101 n.; 2 Tidd 1163. Formerly, in England, the death of one of the plaintiffs in error abated the writ. But latterly it has been held under the statute 8 & 9 W. 3, c. 11, § 7, reported to be in force in Pennsylvania, Rob. Dig. 142 (by which, on suggesting the death of a joint plaintiff or defendant, where the cause of action survives, the writ or action shall not abate, but the action shall proceed), that on the death

of one of several plaintiffs in error the writ of error does not abate: 1 Barn. & Ald. 586; and in this state, where the court below arrested the judgment in a suit by husband and wife for slander of the wife, and they sued out a writ of error, the Supreme Court abated the writ because she died after it issued, the action not surviving and there being no judgment. But if she had died after the judgment had been given for her husband and her, the court said it would have been different, and the judgment would then have survived to the husband: Stroop v. Swarts, 12 S. & R. 76.

<sup>8</sup> 2 Crompt. Pr. 401-2; 2 Barnes 206. See 6 Wheat. 260.

till judgment be affirmed, which is then revived by *scire facias*; execution cannot, however, issue pending the writ of error.<sup>1</sup> The writ of *scire facias ad audiendum errores* not being in use in Pennsylvania, the plaintiff in error proceeds by rule on the defendant to plead to a general assignment of errors,<sup>2</sup> and the representatives of a deceased defendant may in the same mode be compelled to join in error.<sup>3</sup> If there are several defendants, one of whom dies, his death being suggested on the record, the writ proceeds against the survivors.<sup>4</sup> A writ of error may abate by the act of the party, as where it is brought by a *feme sole*, who afterwards marries, the writ abates *by her marriage*, and the court will give the defendant leave to take out execution, though she and her husband have brought a second writ of error.<sup>5</sup>

## SECTION XI.

## DIMINUTION OF RECORD.

Where the whole of the record is not certified by the court below upon the writ of error, the plaintiff may *allege diminution* of the record, and pray a *certiorari* to the court below to bring up the part of the record which is wanting.<sup>6</sup> But it is a rule that a man cannot allege diminution contrary to the record which is certified.<sup>7</sup> The *certiorari* is a judicial writ issuing out of the court where the writ of error is depending, directed commonly to the judges of the court below, but may by consent be directed to the president alone.<sup>8</sup> The Supreme Court will not decide whether certain matters ought or ought not to be returned and certified as part of the record, but will leave it to the court below to determine whether the record contains the whole matter;<sup>9</sup> and when it appears by their return that the whole record has been certified, a second *certiorari* upon a similar suggestion will not be granted.<sup>10</sup> The *præcipe* is part of the record,<sup>11</sup> and so is a warrant of attorney to appear and confess judgment.<sup>12</sup> No paper not attached to the record by the court below, shall be considered part of the record, even by consent; nor shall it, in any event, be used as such, except when certified by the court below, in pursuance of a writ of *certiorari*.<sup>13</sup> By the English practice it is too late to allege a diminution or pray a *certiorari* after *in nullo est erratum* pleaded, without leave of the court.<sup>14</sup> With us the *certiorari* has been granted, upon the application of the plaintiff in error after issue joined and diminution alleged.<sup>15</sup> A *certiorari*, upon suggestion of diminution in the record, may be made by the clerk, and need not be made by the judge of the court below.<sup>16</sup>

<sup>1</sup> Yelv. 112-13; Salk. 264, pl. 6. See 1 Arch. Pr. 216; 6 Wheat. 260.

<sup>2</sup> Commonwealth v. Emery, 2 Binn. 257.

<sup>3</sup> Commonwealth v. McAllister, 1 Watts 307.

<sup>4</sup> 2 Saund. 100 o; 2 Dunl. Pr. 1144.

<sup>5</sup> 2 Str. 880, 1015; see 2 Saund. 101 o.

<sup>6</sup> Fitzsimons v. Salomon, 2 Binn. 436; 2 Bac. Abr. 468; 2 Tidd 1167, 1170.

<sup>7</sup> 1 Rol. Abr. 764; 2 Tidd 1167.

<sup>8</sup> Bassler v. Niesly, 1 S. & R. 472; 2 Tidd 1170.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Fitzsimons v. Salomon, 2 Binn. 436.

<sup>12</sup> Banning v. Taylor, 12 Harris 292.

<sup>13</sup> Rules S. C., Walker's Ct. Rules p. 89.

<sup>14</sup> 2 Crompt. Pr. 362.

<sup>15</sup> Fitzsimons v. Solomon, 2 Binn. 436.

<sup>16</sup> 9 Wheaton 526.

When any writ or return is lost, the docket entry is the next best proof of its former existence, and, as far as it goes, of its contents; and after a former writ of error and decision on all points to which there was any objection, it will be assumed that the parts of the record then not objected to were regular and legal, and the Supreme Court will not reverse, when lost, on a supposition that they were defective.<sup>1</sup>

## SECTION XII.

### ASSIGNMENT OF ERRORS.

*Time of assigning errors.*—After the record is returned, if the writ be not quashed or abated, the plaintiff in error should at once proceed to make his assignment of errors. By rule of court his counsel must, on or before the third day of the term to which the writ is returnable, specify in writing the particular errors which he assigns, and file them in the prothonotary's office; and on failure to do so the court may *non pros.* the writ.<sup>2</sup>

*On certiorari* the same rule obtains.<sup>3</sup>

*On appeals* from the decrees of Orphans' Courts on the settlement of accounts of executors, administrators, or guardians, the specification must be filed before the end of the first week of the term to which the appeal is entered.<sup>4</sup>

*Where there are several plaintiffs in error* they should join in assigning errors.<sup>5</sup>

*Errors not specifically assigned will not be noticed by the court,* as its rule has not been complied with.<sup>6</sup> But the court always reserves to itself the right to correct an error which stares them in the face when they think the justice of the case requires it.<sup>7</sup> And the court will always notice a point affecting its jurisdiction.<sup>8</sup> So where it appears on the record that the plaintiff had no cause of action;<sup>9</sup> but not where the plaintiff might have been able to answer the objection had it been taken below.<sup>10</sup>

*The assignment may be amended* by leave of the court to prevent injustice if a material matter has been omitted, or the defect is merely formal.<sup>11</sup>

*Different kinds of errors.*—An assignment of errors is in the nature of a declaration,<sup>12</sup> and is either of errors in fact or of errors in law. Either may be assigned, but not both together, for they are distinct in their nature, and require different trials.<sup>13</sup> And the

<sup>1</sup> Jones v. Hartley, 3 Whart. 189.

<sup>2</sup> Walker's Ct. Rules, p. 87.

<sup>3</sup> Ibid. 89.

<sup>4</sup> Ibid., Rule 1, p. 84.

<sup>5</sup> 2 Bac. Abr. 217; 2 Tidd 1178.

<sup>6</sup> See *post*, Sect. XIV., "Paper-Books."

<sup>7</sup> Anderson's Executors v. Long, 10 S. & R. 55; Berry v. Vantries, 12 Ibid. 91.

<sup>8</sup> Hazen v. Commonwealth, 11 Harris 355.

<sup>9</sup> Hoffer v. Wightman, 5 Watts 205.

<sup>10</sup> Paull v. Oliphant, 2 Harris 342.

<sup>11</sup> Shenk v. Mingle, 13 S. & R. 32; Galbraith v. Green, Ibid. 85; Logan v. McGinnis, 2 Jones 32.

<sup>12</sup> 2 Bac. Abr. 485.

<sup>13</sup> Ibid. 217; 2 Ld. Raym. 883; 1 Str. 439; Freeborn v. Denman, 2 Halst. 190.

plaintiff may assign several errors in law, but, it is said, only one error in fact.<sup>1</sup>

*Errors in fact* are such matters of fact not appearing on the face of the record as prove the judgment to be not supportable in law, as that the defendant in the original action being an infant appeared by attorney; or that judgment (except in real actions) was given against an infant who is now of full age;<sup>2</sup> or that a *feme* plaintiff or defendant was *covert* at the time of commencing the action;<sup>3</sup> or that a *sole* plaintiff or defendant died before verdict or interlocutory judgment.<sup>4</sup> But nothing can be assigned for error in fact that might have been taken advantage of in the court below, nor can any fact that contradicts the record be assigned for error.<sup>5</sup>

The conclusion of an assignment of errors in fact should be with a verification.<sup>6</sup>

*Error in law*, assignable as ground for reversal, is any substantial defect or error in the proceedings, not cured by the common law, or by statute, and not waived by the party complaining, which was injurious to the party complaining, which is reviewable by the Supreme Court, and which appears on the record or bill of exceptions thereto annexed; as well as any incorrect decision of the court below, on the mere right of the parties as presented by the pleadings, special verdict, bill of exceptions, or opinion filed.

Errors in law are common or special. The common errors are, that the declaration is insufficient in law to maintain the action, and that judgment was given for the plaintiff instead of the defendant, or *vice versa*. Special errors are the want of an original writ or warrant of attorney, or other matter appearing on the face of the record, which shows the judgment to have been erroneous.<sup>7</sup>

*What errors are not ground of reversal.*—Error assignable must be a defect not cured by common law or by statute.<sup>8</sup> Thus if the prothonotary's name be omitted from the process, but it is under seal, defendant cannot take advantage of the omission after appearance and joining in issue.<sup>9</sup>

*It must not have been waived* by the party complaining, and in general every defect or error is considered as waived unless objected to at the time. The Supreme Court has repeatedly declared that it would not notice a point not specifically made in the court below;<sup>10</sup> especially if the defect is merely formal, or might have been cured in the court below if objection had been made there.<sup>11</sup> The court, however, reserves the right to notice errors not objected to below,

<sup>1</sup> Fitzh. N. B. 20.

<sup>2</sup> Sliver v. Shelback, 1 Dallas 166.

<sup>3</sup> 2 Tidd 1169.

<sup>4</sup> Ibid.

<sup>5</sup> Wetmore v. Plant, 5 Conn. 541; Hill v. West, 4 Yeates 385.

<sup>6</sup> 2 Tidd 1169.

<sup>7</sup> Ibid.

<sup>8</sup> 2 Bac. Abr. 492.

<sup>9</sup> Benjamin v. Armstrong, 2 S. & R. 392.

<sup>10</sup> Wright v. Wood, 11 Harris 131; Wollenweber v. Ketterlinus, 5 Ibid. 389; Steckel v. Steckel, 4 Casey 233;

Hilling v. Wilson, 1 Grant 121; Simmonds' Estate, 7 Harris 439; Weaver's Estate, 1 Casey 434; Spangler v. Springer, 10 Harris 460; Hardy v. Watts, Ibid. 35; Convers v. Vanatta, 12 Ibid. 257; Bennett et al. v. Bufluck, 11 Casey 364; Quinn v. Woodhouse, 2 Ibid. 333; Quellman v. Jacobs, 1 Am. Law Reg. 248.

<sup>11</sup> Roop v. Roop, 11 Casey 59; Kemmerer v. Edelman, 11 Harris 143; Schoenberger's Executors v. Zook, 10 Casey 24.

if they think the justice of the case requires it;<sup>1</sup> and the court will always notice a point affecting jurisdiction.<sup>2</sup>

*It must be injurious to the party complaining*, or the court will not hear it. Thus where a witness was improperly rejected but afterwards admitted,<sup>3</sup> the court refused to reverse. So where the error was in an immaterial part of the trial,<sup>4</sup> or where incompetent testimony was admitted, but the fact proved by it was also proved by other conclusive evidence;<sup>5</sup> or where evidence was improperly admitted, but the jury rejected the part of the claim to which it related;<sup>6</sup> where the judge erroneously charged that plaintiff would not be entitled to interest, but the jury found no principal due;<sup>7</sup> or where the court's opinion was favorable to the party complaining,<sup>8</sup> or as favorable as he asked for;<sup>9</sup> or where if instructions had been given they would have been unfavorable;<sup>10</sup> where a judge gives an opinion on an abstract point,<sup>11</sup> or assigns erroneous reasons for a proper conclusion,<sup>12</sup> and numerous other cases.<sup>13</sup>

*It must be reviewable* by the Supreme Court. Therefore where the error complained of is matter of discretion, or on which the decision of the court below is final, it is not assignable for error.<sup>14</sup>

*Errors assigned must appear on the record.*<sup>15</sup>—The presumption being in favor of the correctness of the action of the court below, it is not sufficient that the record does not explicitly show it to have been right, but in order to reverse, the record must show conclusively that the court below was wrong.<sup>16</sup> Therefore, as on motion for summary relief or rule to show cause, there is no bill of exceptions to evidence, the testimony is not part of the record, and the action of the court below cannot be reviewed.<sup>17</sup> As to what may be put on the record, see Whart. Dig. "Error," IV., and ante, "Bills of Exception." Many defects in the proceedings, which are ground of error, have been noticed in the course of this work; but it would be impossible to enumerate the various other matters on which a writ of error may be founded, since there can be no question of law arising in a cause which may not be submitted to the appellate court after the decision of the inferior tribunal, if the party bring it under the conditions already set forth.<sup>18</sup>

*An appeal* brings up the whole case, but for review only. The proceedings are not *de novo*, and no one can be heard except a

<sup>1</sup> Hoffer v. Wightman, 5 Watts 205; Bean's Road, 11 Casey 280.

<sup>2</sup> McCullough's Appeal, 2 Jones 197.

<sup>3</sup> Rogers v. Kichline's Administrators, 12 Casey 293.

<sup>4</sup> Williams et al. v. Williams, 10 Ibid. 315; Edgar v. Boies, 11 S. & R. 445; Munderbach v. Lutz's Administrator, 14 Ibid. 220.

<sup>5</sup> Wolverton v. Commonwealth, 7 S. & R. 273.

<sup>6</sup> Bunce v. Stanford, 3 Casey 265.

<sup>7</sup> Brady v. Colhoun, 1 Pa. R. 140.

<sup>8</sup> Collins v. Rush, 7 S. & R. 147.

<sup>9</sup> Hubley v. Vahhorne, Ibid. 185.

<sup>10</sup> Deal v. Bogue, 8 Harris 228.

<sup>11</sup> Repsher v. Wattson, 5 Ibid. 365.

<sup>12</sup> Piper's Appeal, 8 Ibid. 67; Rupp et al. v. Orr, 7 Casey 517; Thomas v. Mann, 4 Ibid. 520.

<sup>13</sup> See Whart. Dig. "Error," V.

<sup>14</sup> See ante, Sect. II.

<sup>15</sup> Rogers v. Whiteley, 2 Wright 137.

<sup>16</sup> Wagner's Appeal, 7 Ibid. 102; Munderbach v. Lutz's Administrator, 14 S. & R. 220.

<sup>17</sup> Brown v. Ridgway, 10 Barr 42; Calhoun v. Logan, 10 Harris 47; Banning v. Taylor, 12 Ibid. 291.

<sup>18</sup> For what has been held to be error on which the writ will lie, see, in general, Whart. Dig. "Error," V.

party affected by the decree, and he only on exception regularly filed below.<sup>1</sup> Therefore no new evidence will be heard unless under very exceptional circumstances;<sup>2</sup> and where the case is not a proper one for appeal, and there is no bill of exceptions that reaches the objection, an assignment of error dependent on the testimony will not be considered.<sup>3</sup>

*Appeals from the Orphans' Court*, however, since the Act of 1835,<sup>4</sup> are to be heard and determined in such manner as to prevent injustice, and therefore the Supreme Court will, when justice requires, hear new evidence, and order the case to stand over in the mean time.<sup>5</sup>

A *certiorari* tries only the regularity of the proceedings,<sup>6</sup> and where no appeal was entered from the action of the Quarter Sessions in refusing to remit a forfeited recognisance, the Supreme Court cannot review it.<sup>7</sup>

### SECTION XIII.

#### PLEADINGS IN ERROR.

By a rule of the Supreme Court,<sup>8</sup> "the prothonotary shall endorse on each writ of error or *certiorari* to remove proceedings hereafter issued, a rule to appear and plead at the return day of the writ; and on default of appearance when the cause is called for argument, and on proof of ten days' service on the defendant in error or his counsel below, the court will proceed *ex parte*: And it is further ordered, That the court proceed in like manner on proof of the like service of notice in appeal cases;" and on filing his assignment of errors, the plaintiff may rule the defendant to join in error within a reasonable time, which is usually four days.

The defendant may plead or demur to an assignment of errors. Pleas in error are common or special. The common plea or joinder is *in nullo est erratum*, or that there is no error in the record of proceedings, which is in the nature of a demurrer, and at once refers the matters of law arising thereon to the judgment of the court.<sup>9</sup> This plea is usually put in by the prothonotary, upon which the case is at issue, and is placed in its order on the argument-list. When a defendant in error demurs to an assignment of errors in fact, the court will allow him, after judgment on the demurrer, to withdraw it, and rejoin to the assignment of errors.<sup>10</sup>

If the defendant in error would put in issue the truth of an error in fact assigned, he should traverse or deny it, and so join issue thereupon, and not plead *in nullo est erratum*; for, by so doing, he

<sup>1</sup> Hise's Estate, 5 Watts 157; Berryhill v. Dowding, 8 Ibid. 313; Dyott's Estate, 2 W. & S. 557.

<sup>2</sup> Swoyer's Appeal, 5 Barr 382; Elmes v. Elmes, 9 Ibid. 166.

<sup>3</sup> Sipes v. Mann, 3 Wright 414.

<sup>4</sup> Purd. Dig. "Orphans' Court," pl. 50.

<sup>5</sup> Hise's Estate, 5 Watts 157; Wallace's Appeal, 5 Barr 103; McCoy *et al.*

v. Porter, 17 S. & R. 59; Eyster's Appeal, 4 Harris 376.

<sup>6</sup> Commonwealth v. Nathans, 5 Barr 124; Derry Overseers v. Brown, 2 Harris 389.

<sup>7</sup> Harres v. Commonwealth, 11 Casey 416.

<sup>8</sup> Walker's Ct. Rules, p. 89.

<sup>9</sup> 2 Tidd 1173.

<sup>10</sup> Arnold v. Sandford, 14 Johns. 417



would acknowledge the fact alleged to be true.<sup>1</sup> If he would admit the fact, and yet insist that by law it is not error, he ought to rejoin in *nullo est erratum*. If an error in fact be assigned that is not assignable, or be ill assigned, in *nullo est erratum* is no confession of it; but shall be taken only for a demurrer.<sup>2</sup> But if errors in fact and in law are assigned, which we have seen cannot be assigned together, and the defendant plead in *nullo est erratum*, this is a confession of the error in fact, and the judgment must be reversed,<sup>3</sup> for he should have demurred for the duplicity.<sup>4</sup>

Special pleas to an assignment of errors contain matters in confession and avoidance, as a release of errors, or the Statute of Limitations, &c., and are employed wherever the object is to bar a writ of error by matters of fact which do not appear on the record.<sup>5</sup> The plaintiff in error may reply or demur, and proceed to trial or argument.<sup>6</sup>

The pleadings on an assignment of errors must be filed with the prothonotary of the Supreme Court, who, after issue joined, sets down the cause for argument. On an issue in fact, in English practice, a record of *Nisi Prius* is made up, and the parties proceed to trial, as in common cases;<sup>7</sup> and here it is said that the court may try the facts in a summary way, or direct an issue at its own discretion.<sup>8</sup>

## SECTION XIV.

## ARGUMENT, AND HEREIN OF PAPER-BOOKS.

*Argument-list and calling of the cases.*—The terms of the Supreme Court in the various districts have been already spoken of.<sup>9</sup> Within the districts themselves, the arrangement of the times for hearing causes from the different counties, is made by the court from time to time. By rule of court,<sup>10</sup> "The court will call the cases for argument in the order in which they stand on the printed argument-list. Fifteen cases only shall be considered as liable to be called on each day during the term, including the one under argument, if not concluded on the preceding day. There will be no computation for the purpose of having cases inserted with ink, and not numbered in the regular printed series. If the parties, or either of them, shall be ready when a case is called, it will be heard or finally disposed of. If neither party be present or ready to proceed with the argument, the cause shall be *non prossed*, unless reason to the contrary be shown to the satisfaction of the court.

"No cause shall hereafter be heard out of its proper order on the list, except as follows:—If a preference is claimed, the claim shall be made to the prothonotary two weeks before the commencement of

<sup>1</sup> Moore v. McEwen, 5 S. & R. 373.

<sup>2</sup> 2 Tidd 1173.

<sup>3</sup> 2 Bac. Abr. 487.

<sup>4</sup> 1 Str. 439.

<sup>5</sup> Showers v. Showers, 3 Casey 491.

<sup>6</sup> 2 Tidd 1174.

<sup>7</sup> Ibid. 1175.

<sup>8</sup> Lewis, C. J., Banning v. Taylor, 12 Harris 291.

<sup>9</sup> Ante 3.

<sup>10</sup> Walker's Court Rules, Ed. 1857, p. 84, and supplementary rules, adopted March 16th 1858, 15 Leg. Int. 96.

the term, and if he allows it, he shall set it down on the list accordingly. If the prothonotary refuse to allow it, the party may appeal to the court, provided he do so within one week after the commencement of the term.

"All cases brought or to be brought up for review, shall be placed upon the trial-list next succeeding their entry, and shall not be continued without the order of the court on cause shown.

"No case that has been or shall have been once continued shall be again continued, unless it be made to appear by affidavit that some new and sufficient cause therefor has arisen since the last continuance.

"Parties shall have liberty by mutual consent, to allow their cases to be passed on the first and second calling thereof for hearing, but on the third calling every case shall be finally disposed of, unless continued for cause.

"On the third calling of the list, absence of counsel shall not be a cause for further indulgence, but the plaintiff or appellant may argue the case *ex parte*, or the defendant or appellee may demand an affirmance, or the case may be submitted on the printed arguments, or otherwise disposed of according to the discretion of the court."

*Short causes.*—By rules of court, adopted September 6th 1852:<sup>1</sup>

XX. The prothonotary of each district shall keep a separate list for short causes.

XXI. To this list all causes shall be transferred in which the attorney of either party shall certify that it is a short cause.

XXII. The causes on this list shall have precedence over all others, on the Wednesday of every week in which the same causes might be heard if they had remained on the general list and had been reached in their order.

XXIII. Where a cause has been certified to be a short cause by the attorney of one party, and the attorney of the other party will certify that it is not so, and that injustice may be done to his client by placing it on the list of short causes, it shall be put back again on the regular list.

XXIV. On the hearing of short causes, the speeches of the counsel shall be limited to fifteen minutes on each side.

XXV. The hearing of short causes shall not be the exclusive business of Wednesdays. When they are disposed of, the general list shall be called as on other days; but the short list shall be finished before any other business. It shall be the duty of the prothonotary to put in the court-room a copy of the short list, and this shall be notice of the transfer of the causes which are on it. No party shall be permitted to certify any cause back to the regular list after three days from the time it has been placed on the short list.

*Paper-books.*—By rules of court<sup>2</sup>—I. In a case where the writ of error is to a judgment on a verdict, the paper-book of the plaintiff

<sup>1</sup> Walker's Court Rules, p. 97; 6 Harris, App. 577.

Ibid. p. 92; 6 Harris, App. 577.

in error should contain the following matters in the following order:—

1. The names of all the parties as they stood on the record of the court below, at the time of the trial, and the form of the action.

2. An abstract of the proceedings, showing the issue, and how it was made.

3. The verdict of the jury and the judgment thereon.

4. A history of the case.

5. The points, if any, which were submitted in writing to the court below.

6. The charge of the court.

7. The specification of error.

8. A brief of the argument for the plaintiff in error.

9. An appendix, containing the evidence, and, if necessary, the pleading, in full.

II. Where the judgment below is on a case stated in the nature of a special verdict, the facts as agreed on by the parties, the opinion of the court, and the argument of counsel, will be sufficient.

III. In appeals, the arrangement of the appellant's paper-book shall be as follows:—

1. The names of the parties and the nature of the proceeding.

2. A short abstract of the bill or petition, and answer.

3. A history of the case.

4. The report of the auditor, or master, if there was one.

5. The exceptions taken to the report in the court below.

6. The opinion of the court on the exceptions, and decree made.

7. Assignments of error.

8. Argument on part of appellant.

9. Appendix, containing such documentary or other evidence as may be necessary.

IV. In a *certiorari* to the Court of Quarter Sessions, the paper-book shall contain:—

1. An abstract list or brief of all the petitions, motions, orders, reports, exceptions, &c., which may be necessary to give the court here a full view of the record at once; and this in the precise order of their respective dates, and with the date of each prefixed.

2. The exceptions which were overruled or sustained by the final order or judgment of the court.

3. The opinion of the court, if it was filed in writing.

4. The assignment of errors.

5. The argument.

6. An appendix, containing the record in full.

V. The history of the case must contain a closely condensed statement of all the facts of which a knowledge may be necessary in order to determine the points in controversy here; and the want of such a statement cannot be supplied by reference to another part of the paper-book.<sup>1</sup>

VI. Each error relied on must be specified particularly, and by

<sup>1</sup> See *Kline v. Johnston*, 12 Harris 72; *City of Allegheny v. Nelson*, 1 Casey 332.

itself. If any specification embrace more than one point, or refer to more than one bill of exceptions, or raise more than one distinct question, it shall be considered a waiver of all the errors so alleged.<sup>1</sup>

VII. When the error assigned is to the charge of the court, the part of the charge referred to must be quoted *totidem verbis* in the specification.<sup>2</sup>

VIII. When the error assigned is to the admission or rejection of evidence, the specification must quote the full substance of the bill of exceptions, or copy the bill in immediate connection with the specification. Any assignment of error not according to this and the last rule will be held the same as none.<sup>3</sup>

IX. The brief of the argument shall contain a clear statement of the points on which the party relies, with such reasons and arguments as he may see proper to add; together with all the authorities which he thinks pertinent.

X. When an authority is cited, the principle intended to be proved by it must be stated. A naked reference to the book will not be sufficient.

XI. The paper-book of the defendant in error or appellee may, if he chooses, contain no more than his argument, to which Rules IX. and X. will be held to apply.

XII. But he may make it embrace a counter statement, giving such version of the facts as he asserts to be the true one.

XIII. Where the paper-book of the appellee or defendant in error does not contain a counter statement, he will be taken as consenting to and concurring in the history of the case given by the other party.

XIV. The plaintiff in error, or appellant, shall serve a copy of his paper-book on the opposite party, or his attorney, at least ten days before the argument; and when the cause is called, shall furnish one copy to each of the judges, and file two with the prothonotary for the reporter.

<sup>1</sup> This rule does not apply to cases of judgment on facts agreed in the nature of a special verdict. In such cases, it is enough to say that the judgment is erroneous, without more. But the rule has no other exception. Rule 19, 6 Harris, App. 577. It is imperative that the errors should be *particularly* specified, and an assignment that the "court erred in their answer to defendant's point," or "in confirming the auditor's report," is too vague; it should state *how* they erred: *Snyder v. May*, 7 Harris 235; *Franklin Insurance Co. v. Updegraff*, 7 Wright 358; *Bull's Appeal*, 12 Harris 286. And the other part of the rule, that each error must be specified by itself, is equally important: *Reimer v. Stuber*, 8 Harris 460, 464; *Schwenk v. County of Montgomery*, 2 Casey 281. The sole exception

*has been* where manifest injustice would otherwise have fallen on the party: *Daniel v. Daniel*, 11 Harris 198.

<sup>2</sup> The language of the charge, so far as it is complained of as erroneous, should be given *exactly*. A party substituting his own version of it, does so at his peril, and any substantial misstatement of the instruction, whether by accident or design, is fatal. And the quotation should be made *in the specification*: *Criswell v. Altemus*, 8 Harris 124; *Brown v. Brooks*, 1 Casey 210; *Hutchinson v. Campbell*, *Ibid.* 273.

<sup>3</sup> See *Lothrop v. Wightman*, 5 Wright 297; *Peterson v. Speer*, 5 Casey 494; *Stafford v. Stafford*, 3 *Ibid.* 144; *Rice v. F. & D. Bank*, 10 Harris 118; *Himblewright v. Armstrong*, 1 Casey 428; and *Graff v. Barrett*, 5 *Ibid.* 477.

XV. The defendant in error, or appellee, shall serve a copy of his paper-book on the opposite party, or his attorney, at least three days before the argument, furnish a copy to each judge, and file two with the prothonotary.

XVI. When the plaintiff in error or appellant is in default according to these rules, he may be nonsuited on motion; and when the defendant in error or appellee is in default, he will not be heard by the court, except on the request of his adversary, and not then if his negligence has been gross.

XVII. When paper-books are furnished which differ in any material respect from those here prescribed, the parties furnishing them shall be considered in the same default as if none had been furnished, and on proper occasion the court will of its own motion nonsuit or silence the defaulting party.

XVIII. Paper-books shall be furnished in the shape and size of a common octavo pamphlet, on ordinary printing paper.

Attention to the foregoing rules, especially numbers VI., VII., and VIII., is of the utmost importance, and though the court have sometimes been lenient to their violation, yet the late reports are full of cases where a disregard of them has been fatal, and the court have frequently said that they could not be expected to show any further forbearance.<sup>1</sup>

## SECTION XV.

### JUDGMENT, AND HEREIN OF VENIRE DE NOVO.

*Of affirmance, and of barring the writ.*—Where there is no error in the proceedings sufficient to overturn the judgment of the court below, and the *narr.* shows a good cause of action,<sup>2</sup> the judgment of the court of error is, that the judgment of the court below be *affirmed*. This is the common judgment for the defendant in error.<sup>3</sup> On the plea, however, of release of errors or the Statute of Limitations, found for the defendant, the judgment is, that the plaintiff be *barred of his writ*.<sup>4</sup>

*Reversal and recall.*—For error in law the judgment of the Supreme Court is, that the judgment of the court below be *reversed*; for error of fact that it be *recalled*.<sup>5</sup>

*Reversal in part and affirmance in part.*—Where a judgment is entire it cannot be reversed in part and affirmed for the residue.<sup>6</sup> So, when a judgment is entered jointly against two, which is erroneous as to one, it cannot be reversed as to one and affirmed as to the other.<sup>7</sup> So, where a verdict with entire damages was found for the plaintiff as to both charges in case for words spoken, and for causing him to be indicted, and it was afterwards held that the words

<sup>1</sup> Thompson v. McConnell, 1 Grant 396; Ditmars v. Commonwealth, 11 Wright 337; and cases already cited under rules.

<sup>2</sup> Hoffer v. Wightman, 5 Watts 205.

<sup>3</sup> 2 Tidd 1178.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Arnold v. Sandford, 14 Johns 417; *sed vide* Everard v. Paterson, 6 Taunt 625; 1 E. C. L. R. 784.

<sup>7</sup> Boaz v. Heister, 6 S. & R. 18.

were not actionable, the judgment was reversed *in toto*.<sup>1</sup> So, where judgment against an executor on plea of *plene administravit*, was entered below, *de bonis test. &c., et si non de bon. prop.*, the court refused to affirm in part by retaining only the words *de bonis testatoris*, and said the whole must be reversed.<sup>2</sup>

But where the judgment is only in part erroneous, and that part can be separated by the Supreme Court, the judgment will be reversed as to that part and affirmed as to the residue.<sup>3</sup> Thus where the judgment is good as to the debt, but erroneous as to costs;<sup>4</sup> or where a judgment is for distinct matters, the one erroneous and the other regular;<sup>5</sup> or where part of the words laid were not actionable, but the damages were severally assessed.<sup>6</sup>

Where there have been two judgments relating to the same matter, and the first judgment be reversed, the second, which is founded on it, must also be reversed; but the reversal of the last will not affect the first. As if a judgment on an action of debt is against executors, and after a *scire facias* against them judgment is given against them, to have execution of their proper goods, and error is brought on both judgments, in that case, if the first judgment be good and the last erroneous, the last only shall be reversed and the first shall stand.<sup>7</sup>

Where the writ of error is brought by the plaintiff, the Supreme Court may enter such judgment as ought to have been entered below; but where the defendant brings the writ of error, the court can only reverse the judgment.<sup>8</sup>

It has, indeed, been said generally that the power given to the Supreme Court, by the Act of 16th June 1836, to modify as well as reverse the judgments of inferior courts, applies to civil as well as criminal cases. Thus where it appears that a plaintiff in error has a definite defence to a part of the claim on which judgment has been entered against him below, the Supreme Court may, with the consent of the defendant in error, allow the judgment to stand for the residue.<sup>9</sup> And the court is not bound by the form of the prayer of the parties in error, but may give the proper judgment, as where the defendant in error prayed affirmance, the court gave judgment that the plaintiff be barred of his writ.<sup>10</sup>

*Procedendo*.—Where the proper judgment cannot be pronounced by the Supreme Court, or where there remains anything for the court below to do, and a *venire de novo* is not the proper order, the Supreme Court will award a *procedendo*. Thus where a verdict was for plaintiff, subject to the opinion of the court on a point reserved, on which the court afterwards entered judgment for the defendant, the Supreme Court, on error, reversed the judgment, and entered judgment for the plaintiff. It being afterwards suggested that a motion on behalf of

<sup>1</sup> 2 Bac. Abr. 501.

<sup>2</sup> See *Swearingen v. Pendleton*, 4 S. & R. 396.

<sup>3</sup> *Graham v. Keys*, 5 Casey 189.

<sup>4</sup> *Rentzheimer v. Bush*, 2 Barr 88; *Clark v. McKisson*, 6 S. & R. 87; *Swearingen v. Pendleton*, 4 S. & R. 396.

<sup>5</sup> *Boaz v. Heister*, 6 S. & R. 20.

<sup>6</sup> *Strange* 188.

<sup>7</sup> *Ranck v. Becker*, 12 S. & R. 426.

<sup>8</sup> *Swearingen v. Pendleton*, 4 S. & R. 396.

<sup>9</sup> *Thomas v. Northern Liberties*, 1 Harris 120.

<sup>10</sup> Per KENNEDY, J., *Griffith v. Eshelman*, 4 Watts 58.

the defendant for a new trial was undisposed of, and that the lower court had, notwithstanding its pendency, entered judgment for the defendant, the Supreme Court, on motion, permitted the reversal of the judgment to stand, but struck off the judgment entered for the plaintiff, and awarded a *procedendo*.<sup>1</sup> So, where there was judgment for plaintiff on the verdict, subject to points reserved, and the court gave defendant leave to move for a new trial *nunc pro tunc*, on hearing which they discharged the rule, and entered judgment for defendant on the points reserved. The Supreme Court in reversing this latter judgment said the verdict was still standing, and awarded a *procedendo*.<sup>2</sup>

But if the court below arrest judgment erroneously, without setting the verdict aside, the Supreme Court will enter judgment on the verdict even in a hard case where the court below might have set the verdict aside and granted a new trial.<sup>3</sup>

*Venire de novo*.—Where, on the reversal of a judgment, it becomes necessary to submit the cause to another jury, the Supreme Court will, in addition to its judgment, award a *venire facias de novo*. Thus where there has been some error in choosing or returning the jury, or some error in law in rejecting competent or admitting incompetent evidence, or the jury have been misled by an erroneous opinion of the court with respect to the law arising from the evidence,<sup>4</sup> or where entire damages have been assessed on several counts, some of which are bad, in order that the jury may have an opportunity of assessing the damages on each count severally.<sup>5</sup> So where the court below set aside a verdict and entered judgment of *nonsuit*, the Supreme Court on reversing this judgment awarded a *venire de novo*, as otherwise the defendant might lose his opportunity for a bill of exceptions.<sup>6</sup> And generally a *venire de novo* is always awarded where the *narr.* contains a good cause of action, both because he may find evidence to support his action, and in order that the defendant may recover his costs if the plaintiff fail in his action.<sup>7</sup>

And where a judgment for the plaintiff has been reversed for a want of jurisdiction appearing on the case, as left to the jury, he may, notwithstanding, have a *venire de novo*, if there were other facts in the cause withdrawn from the jury by the view taken by the court below, on which the jurisdiction might have been supported.<sup>8</sup> And by the Act of 11th March 1809, § 6,<sup>9</sup> when the facts in any special verdict may be insufficiently or uncertainly found, the judges may remand the record and direct another trial to ascertain the facts.

A *venire de novo* will not be granted, however, unless the error

<sup>1</sup> Harper v. Keely, 5 Harris 234.

<sup>2</sup> Klett et al. v. Claridge, 7 Casey 106.

<sup>3</sup> Wilson v. Gray, 8 Watts 25.

<sup>4</sup> Ebersoll v. Krug, 5 Binn. 51. The power of the Supreme Court to award this process was first discussed and judicially recognised in the case of Sterret v. Bull, 1 Binn. 238, wherein it was said that it tends to the despatch of

justice as it prevents delay.

<sup>5</sup> Shaffer v. Kintzer, 1 Binn. 537.

<sup>6</sup> Wharton v. Williamson, 1 Harris 273.

<sup>7</sup> Railroad v. Norton, 12 Ibid. 465.

<sup>8</sup> Seitzinger v. Steinberger, 2 Jones 379.

<sup>9</sup> 5 Sm. Laws 17; Purd. Dig. 410. pl. 8.

has been committed in the course of the trial. Therefore it was refused where it appeared that the plaintiff had no cause of action when the suit was commenced,<sup>1</sup> or where the plaintiff could not in any event recover,<sup>2</sup> or where no sufficient consideration was laid for defendant's promise.<sup>3</sup> Nor will it be granted where the object of the defendant in error is to have another and different cause submitted to the jury, as where his attempt is to expunge from a declaration drawn in slander of the husband and wife, a count for the slander of the husband, and to proceed to trial for the slander of the wife only, an error not amendable under the Act of 1806.<sup>4</sup> Nor can it be awarded unless there has been a *venire* actually issued, or the cause has been tried by a jury; therefore, where a cause was arbitrated, a *venire de novo* was refused after reversal upon error.<sup>5</sup> But by the Act of February 23d 1824,<sup>6</sup> the Supreme Court may in such case remit the record to the court below, with directions for further proceedings.

The court will always support verdicts where there have been trials on the merits, when they have it in their power. Thus, where a judgment of the Common Pleas had been reversed on error, but before the record was actually remitted, or a *venire facias de novo* awarded, the cause was again tried below. The Supreme Court, after error brought on the second judgment, ordered the record to be remitted and an award of a *venire de novo* to be entered, as of the term when the first judgment was reversed, inasmuch as they had power to do so originally, and the cause had been tried on its merits.<sup>7</sup>

## SECTION XVI.

### REMITTITUR.

By the Act of 1836,<sup>8</sup> as soon as the Supreme Court shall have rendered judgment, or made a final decree or decision, in any cause, action, or matter brought into the same by writ of error, *certiorari*, or appeal, such court shall order the records thereof, with their judgment or decree thereon written, and duly certified, to be remitted to the appropriate court, which judgment, decree, or decision, such court shall duly carry into execution and effect; or the said Supreme Court may, if they see cause, order execution thereof to be done by process issued out of the same, and thereupon order the record to be remitted, as aforesaid.

When, therefore, judgment is given in the Supreme Court, or the writ of error abates, or is discontinued, the record is returned to the court whence it was removed, and the entry of this circumstance is termed a *remittitur*. The party desirous of expediting the return

<sup>1</sup> Miller v. Ralston, 1 S. & R. 309; Griffith v. Eshelman, 4 Watts 51; Reed v. Collins, 5 S. & R. 352; Langer v. Parish, 8 Ibid. 134.

<sup>2</sup> Bellas v. Hays, 5 S. & R. 446.

<sup>3</sup> Whitall v. Morse, 5 S. & R. 358.

<sup>4</sup> Ebersoll v. Krug, 5 Binn. 51.

<sup>5</sup> Ibid.

<sup>6</sup> Pamph. L. 27.

<sup>7</sup> Albright v. McGinnis's Lessee, 4 Yeates 518.

<sup>8</sup> Sect. 11, Pamph. L. 787; Purd. Dig. 412, pl. 19.



of the record, usually advances the costs accrued upon the writ of error to the prothonotary, who makes out the *remittitur* or certificate of the decree of the Supreme Court, attaches it, with a bill of the costs paid, to the record, and immediately delivers it to the prothonotary of the court in which the case originated. The matter is then proceeded in by a *venire de novo*, execution, or *scire facias* against the bail in error, as the case may be, conformably to the judgment of the Supreme Court.

But no further proceedings can be had in the court below until the record is *actually* remitted.<sup>1</sup> Though where there was a second trial after reversal, but before the award of *venire de novo* and *remittitur*, the Supreme Court, after error brought on the second judgment, ordered a *remittitur* and *venire de novo* to be entered as of the term when the first judgment was reversed.<sup>2</sup> And where the record was never actually in the Supreme Court, the case having been tried on paper-books only, an order of affirmance, and that the record be remitted, will be a constructive remitter, on which the court below may proceed.<sup>3</sup>

Where the Supreme Court gives judgment in a case on error, and the record is remitted, the judgment becomes of record in the court below, and is to be enforced as if originally entered there.<sup>4</sup>

We have already stated that the recognisance of bail is transmitted with the record, when taken before a judge of the Common Pleas. It therefore becomes a part of the record, and is on the affirmance of the judgment remitted to the court below, and the *scire facias* on it cannot issue from the Supreme Court, although taken there originally, but must be brought in that court where the record remains,<sup>5</sup> or elsewhere, if the defendant does not reside in such county.<sup>6</sup> It may be proper to observe that in the proceeding by *scire facias*, it is not necessary to sue out execution on the judgment in order to charge the bail, as a render of the body would not excuse the bail, nor anything but a release or satisfaction of the judgment satisfy the condition of the recognisance.<sup>7</sup>

By rule of court,<sup>8</sup> where a cause goes back to the court below for further proceedings, the prothonotary certifies and sends back with the order, decree, or judgment, a copy of the opinion of the court.

## SECTION XVII.

### COSTS IN ERROR.<sup>9</sup>

By the Act of 1791, constituting the High Court of Errors and Appeals (which we have seen is now abolished), if the judgment was affirmed, or the plaintiff in error failed to prosecute his suit

<sup>1</sup> Cox's Adm. v. Henry, 12 Casey 445.

<sup>2</sup> Albright v. McGinnis's Lessee, 4 Yeates 518.

<sup>3</sup> Pennsylvania Railroad Co. v. Commonwealth, 3 Wright 413.

<sup>4</sup> McMasters v. Blair, 7 Casey 467; Shaw v. Boyd, 2 Jones 215.

<sup>5</sup> Smith v. Ramsay, 6 S. & R. 573.

<sup>6</sup> Act 11 March 1809, § 7, 5 Sm. Laws 15; Purd. Dig. "Errors," pl. 9.

<sup>7</sup> Smith v. Ramsay, 6 S. & R. 573.

<sup>8</sup> Walker's Court Rules, Ed. 1857, p. 89.

<sup>9</sup> See more fully *post*, "Costs."

with effect, he was liable to double costs. But if the judgment was reversed each party paid his own costs.<sup>1</sup> The general rule is, that if the judgment be *affirmed*, the successful party is entitled to costs: but where the judgment of an inferior court is *reversed*, the costs in error are not *recovered* by the party who obtains the reversal,<sup>2</sup> and if levied by execution the court will order the different officers to refund them.<sup>3</sup> Neither is the party reversing the judgment liable for costs. In such cases each party pays his own costs.<sup>4</sup> But if the Supreme Court orders a *venire de novo* it has a right to impose terms as to costs, and if no terms are imposed, the costs abide the final event of the suit.<sup>5</sup>

Where a plaintiff, dissatisfied with a judgment in his own favor, brings error unsuccessfully, none of the statutes on the subject entitle him to the costs in error.<sup>6</sup>

Where the judgment is reversed and a *venire facias de novo* ordered, and the defendant in error pays the costs on such reversal, in order to take down the record to the Common Pleas, where he again obtains judgment, he may afterwards maintain *assumpsit* against the plaintiff in error to recover back the costs so paid by him.<sup>7</sup>

## SECTION XVIII.

### RESTITUTION.

*When it will be ordered and when not.*—On the reversal of an execution executed, it is usual for the court to award restitution of the money or thing of which defendant has been deprived by the execution.<sup>8</sup> This, however, is not matter of right but of grace, and will not be awarded where the justice of the case does not call for it, as where the process is set aside for a mere slip, and there is danger that the plaintiff may lose his demand;<sup>9</sup> or where the proceedings between landlord and tenant were irregular, but it appeared that the defendant was in possession under agreement of plaintiff;<sup>10</sup> or where the court reversed a judgment on a *sci. fa. post annum et diem*, on which defendant's land had been sold, and part of the money paid to plaintiff and part to other creditors, and there was a suggestion of insolvency of defendant.<sup>11</sup> In this case the court ordered the money received by plaintiff to be paid into court, to await further order. So, where a judgment was reversed, and the land was bound by judgments subsequent in date to it, the court refused to award restitution to a defendant in insolvent circumstances, but ordered the money to be brought into court, and applied first to the dis-

<sup>1</sup> See 3 Sm. Laws 33.

<sup>2</sup> Landis v. Shaeffer, 4 S. & R. 199.

<sup>3</sup> Wright v. Lessee of Small, 5 Binn. 204.

<sup>4</sup> Landis v. Shaeffer, 4 S. & R. 199.

<sup>5</sup> Work v. Lessee of M'Clay, 14 S. & R. 265.

<sup>6</sup> Cameron v. Paul, 1 Jones 277.

<sup>7</sup> Hamilton v. Aslin, 3 Watts 222.

<sup>8</sup> Ranck v. Becker, 13 S. & R. 43.

<sup>9</sup> Harger v. Commissioners, 2 Jones 251.

<sup>10</sup> Fitzalden v. Lee, 2 Dallas 205; s. c.

*nom.* Alden v. Lee, 1 Yeates 160, 207.

<sup>11</sup> Kirk v. Eaton, 10 S. & R. 103.

charge of all liens according to their priority, and the balance, if any, to the defendant himself.<sup>1</sup>

*The order of restitution* is, that "the defendant be restored to all things which he has lost on occasion of the judgment aforesaid," and it is a part of the judgment itself, conclusive of the matters adjudicated by it, not questionable in any collateral proceeding, not to be delayed to abide the final result of the suit in which it is rendered, and *assumpsit* will not lie upon it.<sup>2</sup>

*When made.*—The order should be made when the execution is reversed, but it may be made at any subsequent time while the record is still in the court.<sup>3</sup>

*What will be restored.*—The Supreme Court, however, will award restitution only of what the defendant in error has actually received. If, therefore, land has been sold by the sheriff for a small sum, subject to the claim of the plaintiff, as ascertained by a verdict and judgment which has been removed to that court by writ of error, and the plaintiff purchases it of the sheriff's vendee and obtains possession, the court will not order restitution of the amount subject to which the land was sold, as well as the price paid for it.<sup>7</sup> Nor will they award a *scire facias* to show cause why this should not be done.<sup>4</sup> But the defendant is entitled to be restored to everything he has lost by the execution, as where he has lost possession of land by erroneous judgment in ejectment, he is entitled on reversal not only to possession but to intermediate crops.<sup>5</sup> By the Act of 1705,<sup>6</sup> it is provided that if any judgment, whereupon any lands, tenements, or hereditaments have been sold, shall be reversed for error, none of the said lands, &c., so as aforesaid taken or sold, nor any part thereof, shall be restored, nor the sheriff's sale or delivery thereof avoided, but restitution in such cases only of the money or price for which such lands were sold. Where, however, the purchase is made under void process, this act will not prevent restitution of the land.<sup>7</sup> This act is said to be "strictly agreeable to the principles of the common law, in case of the sale of a term for years in England, in order that sales by sheriffs may not be defeated, *provided the sale has been to a stranger.*"<sup>8</sup> If, therefore, the sale has been made to the plaintiff in the execution, it would seem that restitution of the land itself might be had from him. So, if it were extended and delivered to him to pay in seven years, it shall be restored, and not merely the extended value.<sup>9</sup>

*The writ is in the nature of an execution,*<sup>10</sup> and if the person of the plaintiff be out of reach of an attachment, or it be inexpedient to issue an attachment against him, the writ is usually issued for the purpose of levying on his estate, personal or real, to make the money. Except in special cases of this kind, however, it is not the

<sup>1</sup> *Ranck v. Becker*, 13 S. & R. 41.

<sup>2</sup> *Duncan v. Kirkpatrick*, 13 S. & R. 292; *Breeding v. Blocher*, 5 Casey 349.

<sup>3</sup> *Cassel v. Duncan*, 2 S. & R. 57.

<sup>4</sup> *Cassell v. Cooke*, 8 Id. 296.

<sup>5</sup> *Breeding v. Blocher*, 5 Casey 347.

<sup>6</sup> Sect. 9. 1 Sm. Laws 61; *Purd.*

*Dig.* 443, pl. 80.

<sup>7</sup> *Burd v. Dansdale*, 2 Binn. 92.

<sup>8</sup> *YEATES, J.*, Lessee of *Heister v. Fortner*, 2 Binn. 47.

<sup>9</sup> 1 Arch. Pr. 265.

<sup>10</sup> *Duncan v. Kirkpatrick*, 13 S. & R. 294.

practice to issue the writ itself (though it may always be done if desired), but in lieu of it the court makes an order of restitution, which will be enforced by attachment if disobeyed. The Supreme Court, however, will not enforce its order by attachment in ordinary cases, but will send the record, with the order endorsed on it, to the court below to be enforced there.<sup>1</sup>

Where an executor is defendant in the writ, it may be *de bonis testatoris et si non, de bonis propriis*.

The writ or order is a lien on goods from the time it goes into the hands of the sheriff, and on lands from the time of the levy, being within the general rule as to executions.<sup>2</sup>

## SECTION XIX.

### LIMITATION AS TO NEW SUIT.

By the 2d section of the Act of March 27th 1713,<sup>3</sup> it is enacted that if in any of the suits which are enumerated in the first section (which embrace personal actions only), "judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill, then, and in every such case, the party plaintiff, his heirs, executors, or administrators, as the case may require, may commence a new action or suit from time to time within a year after such judgment reversed or given against the plaintiff as aforesaid, and not after."

## SECTION XX.

### ERROR CORAM VOBIS.

Where an issue in fact has been decided, there is (as we have already seen) no appeal in our law from its decision, except in the way of motion for new trial; and its being wrongly decided is not error in that technical sense to which a writ of error refers. So, if a matter of fact should exist which was not brought into issue, but which if brought into issue would have led to a different judgment, the existence of such fact does not, after judgment, amount to error in the proceedings. For example, if the defendant has a release but does not plead it in bar, its existence cannot, after judgment on the ground of error or otherwise, in any manner be brought forward.<sup>4</sup> But there are certain facts which affect the *validity and regularity of the legal proceeding itself*; such as the defendant having appeared in the suit while *under age*, by *attorney* and not by guardian;<sup>5</sup> but a defendant in ejectment cannot assign this for error.<sup>6</sup> So, where the plaintiff or defendant was a married woman

<sup>1</sup> Russell v. Gray, 6 S. & R. 208.

<sup>2</sup> Boal's Appeal, 2 Rawle 37.

<sup>3</sup> 1 Sm. Laws 76; Purd. Dig. 656, pl. 18.

<sup>4</sup> Steph. on Plead. 139, 140.

<sup>5</sup> Styles 406.

<sup>6</sup> 1 Str. 25.

at the commencement of the suit, or died before verdict or interlocutory judgment.<sup>1</sup> Such facts as these, however late discovered and alleged, are *errors in fact*, and sufficient to reverse the judgment upon writ of error. To such cases the writ of error *coram vobis* applies; because the error in fact is not the error of the judges; and reversing it is not reversing their own judgment.<sup>2</sup> If defendant dies before judgment the writ is properly issued in the name of his administrator.<sup>3</sup>

It was at one time doubted if the writ would lie in Pennsylvania,<sup>4</sup> but it is now settled that it will,<sup>5</sup> and a recent case is reported,<sup>6</sup> where it was resorted to. But in practice the same end is now generally attained by motion.

Error lies to the judgment of the court below on the writ of error *coram vobis*.<sup>7</sup>

## SECTION XXI.

### ERROR IN CRIMINAL CASES.

By the Act of 31st March 1860,<sup>8</sup> any person indicted in the Quarter Sessions, Oyer and Terminer, or General Jail Delivery, may remove the indictment and proceedings into the Supreme Court by *certiorari*, or writ of error. But the written consent of the attorney-general must be certified on the writ, or it must be specially allowed by the Supreme Court, or one of the judges thereof, on cause shown.

By the same act, on the trial of an indictment for murder or voluntary manslaughter, the defendant may have a bill of exceptions upon any point of law or evidence, or may submit points in writing, and require the court to file the point and their answer of record, and in either case a writ of error may be allowed by the Supreme Court, or a judge thereof, if specially applied for, and cause shown within thirty days after sentence. If the Supreme Court be sitting in banc in any district, the application must be made to it, otherwise to one of the judges, and the court or judge shall appoint a time and place for the hearing not more than thirty days thereafter, and shall make such orders as may be necessary concerning notice to the Commonwealth, paper-books, &c.

The writ issues from the proper district, but the application and hearing may be made and had in any district. Upon affirmance the court may make any further order for carrying the judgment into effect, and in case of reversal the record is remanded with their opinion to the proper court for further proceeding.

The *allocatur* is granted by the Supreme Court whenever they

<sup>1</sup> 2 Saund. 101 a; see, further, 1 Arch. Pr. 212.

<sup>2</sup> 2 Tidd 1136-7.

<sup>3</sup> Devereux v. Roper, D. C. Phila.; 8 Leg. Int. 64; 1 Phila. Rep. 182.

<sup>4</sup> Hill v. West, 4 Yeates 385.

<sup>5</sup> Day v. Hamburg, 1 Browne 75, 82, where see the subject discussed, and the proceedings in error *coram vobis* set

out at length; Hurst v. Fisher, 1 W. & S. 438; Durand v. Halbach, 1 Miles 49; and see, further, as to the practice, 1 Arch. Pr. 243, 249.

<sup>6</sup> Wood's Ex'r. v. Colwell, 10 Casey 92.

<sup>7</sup> Ibid.

<sup>8</sup> Sects. 33, 57-61, Pamph. L. 439 etc., Purd. Dig. 414.

entertain a doubt of the accuracy of the rulings in a material particular, but not otherwise; and it is not usual to hear counsel on the application,<sup>1</sup> but the Commonwealth may have the writ without special allowance, or the permission of the attorney-general.<sup>2</sup> The same presumption in favor of the regularity of proceedings obtains as in civil cases.<sup>3</sup> The inquiries of the court are confined to the points made below and put upon the record, and the prisoner must show a substantial error, injurious to himself.<sup>4</sup> The act does not authorize a general exception to the charge of the court, nor require it to be written out.<sup>5</sup>

## SECTION XXII.

## ERROR TO SUPREME COURT OF THE UNITED STATES.

In certain cases a writ of error lies from the Supreme Court of this State to the Supreme Court of the United States, by virtue of the Constitution of the United States and the Acts of Congress in pursuance thereof. This head will be found treated at length, *ante*, chap. IV., p. 129.

## SECTION XXIII.

## CERTIORARI TO ALDERMEN.

*Nature of the writ.*—The writ of *certiorari* is said to be a writ of error in every respect but form,<sup>6</sup> and is described in general as a writ where the court would be certified of a record in another, or sometimes in the same court. And he to whom it is directed ought to send the same record, or the tenor of it as commanded by the writ; and if he fail to do so, then an *alias* is awarded; afterwards a *pluries*, with a clause of *vel causam nobis significas*; and then an attachment if good cause be not returned upon the *pluries*. It is a judicial writ, issuing out of the court to which the proceedings are to be removed, directed to the judge or officer who has custody of the record.<sup>7</sup>

Although the writ of *certiorari* is a writ of extensive application, and the Supreme Court has all the revisory powers of the King's Bench over inferior jurisdictions, yet when a special jurisdiction is created by statute, it cannot be taken from the magistrate, to whom it is given, to be exercised by that court. Its power, then, is purely correctional. Where a superior court has concurrent jurisdiction, it may issue its *certiorari* to remove an action, or an indictment, or other matter determinable by the course of the common law, and

<sup>1</sup> *Com. v. Ferrigan*, 8 Wright 386.

<sup>2</sup> *Com. v. Capp*, 12 *Ibid.* 53.

<sup>3</sup> *Cathcart v. Commonwealth*, 1 *Ibid.* 109; *Taylor v. Commonwealth*, 8 *Ibid.* 131.

<sup>4</sup> *Fife et al. v. Commonwealth*, 5 Casey 429; *Taylor v. Commonwealth*, 8 Wright 131.

<sup>5</sup> 6 Pittsburgh Leg. J. 178; and see

generally on this head, Wharton's Digest, Supplement, tit. "Error," X., and *Hopkins v. Commonwealth*, 14 Wright 9.

<sup>6</sup> *Cooke v. Reinhart*, 1 Rawle 321; *Welker v. Welker*, 3 Pa. R. 24.

<sup>7</sup> *ROGERS, J., Commonwealth v. McAllister*, 1 Watts 307.

proceed in it as the inferior court would have done; but where a proceeding is according to a statute, a *certiorari* lies to remove it only after judgment and for revision as to its regularity.<sup>1</sup>

This writ, when required for the purpose referred to in this section, issues out of the Court of Common Pleas, directed to the justice by whom the judgment has been rendered, commanding him "to certify and send before them the plea with all things touching the same so full and entire as before him they remain, together with the writ itself; that they may further cause to be done thereupon that which of right and according to the laws and constitution of this Commonwealth ought." The writ is tested as of the preceding term, and made returnable at the same time as other process.

The power of the Common Pleas to issue writs of *certiorari* is derived from the constitution of the state,<sup>2</sup> which declares that the judges of the Courts of Common Pleas shall within their respective counties have the like powers with the judges of the Supreme Court to issue writs of *certiorari* to justices of the peace. By the Act of 20th March 1810,<sup>3</sup> no writ of *certiorari* from the Supreme Court to a justice, in a civil action, is now available to remove proceedings. This act, however, does not apply to the proceedings of two justices under the Landlord and Tenant Act,<sup>4</sup> but it does to an action for a penalty for breach of a city ordinance,<sup>5</sup> and an action under the stray law.<sup>6</sup>

*Certiorari* lies for either party in all cases<sup>7</sup> where a mistake of law, apparent on the record, is to be corrected. It is the proper remedy, therefore, when the justice has exceeded his jurisdiction, as where he has given judgment for a greater sum than the law allows,<sup>8</sup> or where he has no jurisdiction at all, as where he convicts a defendant in a penalty under a void ordinance.<sup>9</sup> And a defendant does not forfeit his right to a *certiorari* by taking an ineffectual appeal.<sup>10</sup>

*Preliminary oath.*—Before the writ issues, the party applying for it, or his agent or attorney,<sup>11</sup> must declare on oath or affirmation, before a judge or the prothonotary of the court,<sup>12</sup> "that it is not for the purpose of delay, but that, in the opinion of the party applying for the same, the cause of action was not cognisable before a justice, or that the proceedings proposed to be removed are, to the best of his knowledge, unjust and illegal, and if not removed, will oblige him to pay more money, or to receive less from his opponent than is justly due; a copy of which affidavit shall be filed in the protho-

<sup>1</sup> Commonwealth v. Nathans, 5 Barr 124; Carpenter's Case, 2 Harris 486.

<sup>2</sup> Art. 5, § 8.

<sup>3</sup> Sect. 24. 5 Sm. Laws 172; Purd. Dig. 412, pl. 22.

<sup>4</sup> Lenox v. McCall, 3 S. & R. 95; Clark v. Yeat, 4 Barr 185.

<sup>5</sup> Spicer v. Rees, 5 Rawle 119.

<sup>6</sup> Frick v. Patton, 2 Ibid. 20, and on this subject see *post*, p. 714.

<sup>7</sup> Act of 20th March 1810, § 24; 5 Sm. Laws 172; Purd. Dig. 412, pl. 23.

<sup>8</sup> Geyger v. Stoy, 1 Dallas 146.

<sup>9</sup> City of Pittsburgh v. Young, 3 Watts 363; Overseers of St. Clair v. Overseers of Moon, 6 W. & S. 522; and see *post*, p. 712.

<sup>10</sup> Commonwealth v. Fiegle, 2 Phila. R. 215.

<sup>11</sup> Act 27th March 1833, § 2, Pamph. L. 99; Purd. Dig. 411, pl. 12.

<sup>12</sup> Act 3d February 1817, § 1, 6 Sm. Laws 398; Purd. Dig. 413.

notary's office." It is not necessary to pursue precisely the words of the act, but the affidavit should substantially set forth the reasons of removal; and an omission to state that the proceedings would oblige the party to pay more money than was *justly due*, was held fatal.<sup>1</sup> So in a *certiorari* to remove proceedings against a special bail, an affidavit that the defendant would be obliged to pay more money than he *owed*, was held insufficient.<sup>2</sup>

*Precipe and recognisance.*—A special *allocatur* is not now required,<sup>3</sup> and the writ issues on a *precipe*, after the filing of the affidavit above described. To make it effective, however, as a *supersedeas*, the prothonotary previous to the issue of the writ takes from the party applying, or his agent or attorney,<sup>4</sup> a recognisance in the nature of bail in error, which is subscribed by the surety or bail upon the appearance-docket; it is conditioned that the party applying for the writ shall prosecute it with effect, and if the judgment of the justice be affirmed by the court that he shall pay the amount of the debt, interest, and costs, or else that the bail will pay it for him. It is only necessary for the like purposes, and in like cases as bail in error,<sup>5</sup> being an extension by construction of the statutes requiring bail in error to *certiorari*.<sup>6</sup>

*Time of issue and service.*—No judgment shall be set aside in pursuance of a writ of *certiorari*, unless the same is issued within twenty days after judgment reversed, and served within five days thereafter; and no execution shall be set aside unless the *certiorari* is issued and served within twenty days after the execution issued.<sup>7</sup> This provision applies only to civil actions, however, and does not include an action for a penalty under an ordinance;<sup>8</sup> nor does it apply to cases where the justice has no jurisdiction, as where the cause of action was not cognisable by him, or where the summons was not served in the manner directed by the Act of Assembly, and the defendant did not appear.<sup>9</sup> So, also, if the judgment be obtained by trick or fraud.<sup>10</sup> In all these cases the writ may issue within a reasonable time after defendant has notice; and reasonable time is held as a general rule, in analogy to the period fixed by the act allowing the *certiorari*, to be twenty days after the defendant first had notice in any manner of a judgment against him.<sup>11</sup> Defendant in such case is bound to show affirmatively his want of knowledge,<sup>12</sup> and this he may do by parol.<sup>13</sup> Where he has had notice, the judgment will not be set aside, although the record does not show a service of process.<sup>14</sup>

<sup>1</sup> Benner v. Ducoing, 1 Browne 217.

<sup>2</sup> Monell v. Phillips, C. P. Phila., June 1825, MS.

<sup>3</sup> Act 26th April 1855; Pamph. L. 304.

<sup>4</sup> Act 27th March 1833, § 2; Pamph. L. 99; Purd. Dig. tit. "Errors," pl. 12.

<sup>5</sup> See ante, p. 684.

<sup>6</sup> Clark v. McCormack, 2 Phila. R. 68.

<sup>7</sup> Act 20th March 1810, § 21, 5 Sm. Laws 171; Purd. Dig. 413.

<sup>8</sup> Caughey v. Pittsburgh, 12 S. & R. 53.

<sup>9</sup> Lacock v. White, 7 Harris 498;

Stedman v. Bradford, 3 Phila. Rep. 258; Offerman v. Downey, C. P. Phila., Oct. 1849, 2 Wh. Dig. 134, pl. 278; Fritz v. Fisher, 3 Am. Law Reg. 248.

<sup>10</sup> Lacock v. White, 7 Harris 498.

<sup>11</sup> Stedman v. Bradford, 3 Phila. Rep. 258.

<sup>12</sup> Brookfield v. Hill, 1 Ibid. 439.

<sup>13</sup> Lacock v. White, 7 Harris 498.

<sup>14</sup> Dailey v. Bartholomew, 1 Ash. 135.



*Service and return of the writ.*—It is the duty of the party taking the *certiorari* to see that it is delivered to the justice before whom the proceedings were had, and that the record is properly returned by him. To enforce the return in due time a rule upon the magistrate will be granted by the court if necessary. By rule of court in Philadelphia it is made the duty of the party suing out a *certiorari* to cause the record to be returned two days before the first argument day,<sup>1</sup> in default of which the writ will be dismissed.

The return should include the whole proceedings before the justice, and the original precepts should be sent, with copies of the judgment and executions if any be issued.<sup>2</sup> A transcript would neither answer the requirements of the act nor the exigence of the writ at the common law.<sup>3</sup>

No other return than that of the record can be legally made. The tribunal to which the *certiorari* issues cannot inquire into the death of parties to the suit, and return such fact. Such a return would be insufficient, and would subject them to an attachment.<sup>4</sup>

A third person cannot object to a misdirection of the writ, if the officer having the keeping of the record waive the objection and return it. The death of the defendant in error, therefore, is no cause for quashing the writ, though it occurred before the writ issued. The mode is to suggest the death, and rule the administrator to appear and plead to the exceptions assigned.<sup>5</sup>

It has never been the practice in this State to serve a copy of the writ on the attorney, as in England, nor is the writ accompanied by a citation, as in the Federal courts. But the court of review will take care that notice is given, and that proper parties are put on the record.

*Diminution of record.*—In case the whole record is not returned, either party may allege *diminution*, and a rule on the justice to return the missing part will be granted.<sup>6</sup>

*Assignment of errors.*—By rule of court in Philadelphia and most other counties, "the particular exceptions intended to be insisted on must be filed two days before the first argument day, and on default thereof the judgment below shall be affirmed of course; the assignment of general errors is insufficient and void."<sup>7</sup> Such a rule is valid and necessary for the despatch of business.<sup>8</sup> But though matters not specially excepted to will not in general be noticed, yet the court always reserves to itself the right, whenever justice demands it, to notice a substantial error in the proceedings, such as a want of jurisdiction.<sup>9</sup>

*For what errors judgment will be reversed.*—By the Act of 1810,<sup>10</sup> the "proceedings of a justice of the peace shall not be set

<sup>1</sup> Walker's Ct. Rules, Ed. 1857. C. P., Rule 12, sect. 2.

<sup>2</sup> Act 20th March 1810, § 22, 5 Sm. Laws 171; Purd. Dig. 412, pl. 23.

<sup>3</sup> Torr's Appeal, 1 Rawle 77.

<sup>4</sup> Commonwealth v. McAllister, 1 Watts 307.

<sup>5</sup> Ibid. 308.

<sup>6</sup> See ante, p. 691.

<sup>7</sup> Walker's Ct. Rules 1857. Rule 12, C. P.

<sup>8</sup> Snyder v. Bauchman, 8 S. & R. 336.

<sup>9</sup> Herrigas v. M'Gill, 1 Ash. 152; Commonwealth v. Cane, 2 Pars. 265; and see ante 692.

<sup>10</sup> Sect. 22, 5 Sm. Laws 171; Purd. Dig. 412.

aside or reversed for want of formality in the same, if it shall appear on the face thereof that the defendant confessed a judgment for any sum within the jurisdiction of the justice, or that a precept issued in the name of the Commonwealth, requiring the defendant to appear before the justice on some day certain, or directing the constable to bring the defendant forthwith before him, agreeably to the provisions of that act, and that the said constable having served the said precept, judgment was rendered on the day fixed in the precept or on some other day, to which the cause was postponed by the justice with the knowledge of the parties; and no execution shall be set aside for informality, if it shall appear on the face of the same that it issued in the name of the Commonwealth, after the expiration of the proper period of time, and for the sum for which judgment had been rendered, together with interest thereon and costs, and a day mentioned on which return is to be made by the constable, and that the cause of action shall have been cognisable before a justice of the peace.

In matters within his ordinary jurisdiction, and where the proceedings are according to the common law, every reasonable presumption, not inconsistent with the record, will be made in favor of the justice's proceedings, except on the point of jurisdiction,<sup>1</sup> and his judgment, though erroneous, is binding on the parties until reversed on *certiorari* or appeal.<sup>2</sup> But his jurisdiction must appear affirmatively on the record,<sup>3</sup> and as it does not extend to all cases of contract, the record ought to show the nature of the contract to be such as is cognisable by a justice.

But in summary convictions, and in actions under special jurisdictions for penalties, &c., no intendment will be made in favor of his proceedings, and the record must show not only his jurisdiction, but the proof sufficient to sustain every material point.<sup>4</sup>

Thus, in an action of debt for a penalty for the violation of an ordinance, the record should state not only the substance of the ordinance, but what is alleged against the defendant, as to his acts, or omission of anything to be done, which exposes him to the penalty;<sup>5</sup> and if there are two penalties, the judgment must be specific for which it is rendered.<sup>6</sup> So where the cause of action was "for a violation of the first section of an ordinance of the district aforesaid, passed the 1st July 1820," nothing more being stated, the court reversed the proceeding for informality.<sup>7</sup>

The day of appearance and judgment must appear on the record;<sup>8</sup> but if the day on which the parties appeared is mentioned, and then the docket-entry proceeds to state that the cause was examined, and judgment rendered, the court will presume that judgment was given on that day;<sup>9</sup> and where the defendant did not appear, the

<sup>1</sup> *Buckmyer v. Dubs*, 5 Binn. 32; 265; *Commonwealth v. Fiegel*, 2 Phila. Cooke v. Reinhart, 1 Rawle 322; Rep. 215.

*Gibbs v. Alberti*, 4 Yeates 373; *Bradley v. Flowers*, *Ibid.* 436; *Brown v. Quinton*, 3 P. L. J. 425.

<sup>2</sup> *Emory v. Nelson*, 9 S. & R. 12.

<sup>3</sup> *Mulvary v. Miller*, 1 Browne 339.

<sup>4</sup> *Commonwealth v. Cane*, 2 Pars.

<sup>5</sup> *Manayunk v. Davis*, 2 Pars. 289.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Fraily v. Sparks*, 2 Pars. 232.

<sup>8</sup> *Anon.*, Add. 272.

<sup>9</sup> *Buckmyer v. Dubs*, 5 Binn. 29.

record must show that process was served in the manner required by law.<sup>1</sup>

If the proceedings appear on the face of the record to be regular, and jurisdiction is shown, the court in general will not look beyond the face of the magistrate's return.<sup>2</sup> But it will sometimes to prevent injustice look into the evidence given before the justice,<sup>3</sup> though that need not be set out at length, the justice being only required to state the demand and the *nature* of the evidence produced in support of it.<sup>4</sup> But for some purposes the court will receive parol evidence, as where there is reason to infer corruption or partiality on the part of the justice in refusing to hear material testimony;<sup>5</sup> where a want of jurisdiction cannot be otherwise shown, as where one justice re-examines a matter already determined by another;<sup>6</sup> where it does not clearly appear whether the judgment is rendered against the defendant in his private or official capacity as a justice of the peace, who assigns for error an omission of the notice allowed by law to justices of the peace before suit instituted;<sup>7</sup> or where he decides on the oath of the plaintiff alone.<sup>8</sup> But the fact that judgment was given on oath of plaintiff alone, must appear on the record or else be averred by way of exception and shown by proof,<sup>9</sup> though the oath of defendant will be enough to shift the burden of proof whether other evidence was produced or not, to the plaintiff.<sup>10</sup> And no favor will be shown to a defendant who might have had a remedy by appeal and lost it by his own *laches*,<sup>11</sup> nor will the court go so far as to interfere with matters properly within the discretion of the justice.<sup>12</sup>

*Hearing.*—A *certiorari* must be heard and decided at the *term* to which the proceedings of the justice are made returnable.<sup>13</sup> At the hearing, the attorneys for the parties, deliver paper-books setting forth the points to be discussed. In Philadelphia a special day is usually assigned to the hearing of *certioraries*.

The *judgment* of the Common Pleas on the *certiorari*, whether of affirmance or reversal, is final, and no writ of error will lie upon it.<sup>14</sup> But this applies only to cases where the justice's jurisdiction is given by the Act of 1810;<sup>15</sup> and a writ of error will lie to a judg-

<sup>1</sup> *Fraily v. Sparks*, 2 Pars. 232; *Buchanan v. Specht*, 1 Phila. Rep. 252; *Fisher v. Longnecker*, 8 Barr 410.

<sup>2</sup> *Curran v. Atkinson*, 1 Ash. 51; *Managers, &c., v. Zinck*, *Ibid.* 64; *Overseers of Coventry v. Cummings*, 2 Dallas 114.

<sup>3</sup> *Buckmyer v. Dubs*, 5 Binn. 29; *Pray v. Reynolds*, C. P. Phila., 2 Wh. Dig. "Justice," pl. 250.

<sup>4</sup> *Jones v. Evans*, 1 Browne 209.  
<sup>5</sup> *Worstell v. Meadowcraft*, C. P. Phila. June 1825, MS.

<sup>6</sup> *Dumber v. Jones*, 1 Ash. 215; *Burgin v. Martin*, 3 Yeates 479.

<sup>7</sup> *Fitzsimmons v. Evans*, C. P. Phila., June 1825, MS.

<sup>8</sup> *Fisher v. Bailey*, 1 Ash. 209; *Sharpe v. Thatcher*, 2 Dallas 77.

<sup>9</sup> *Wilson v. Wilson*, 5 P. L. J. 462.

<sup>10</sup> *Vansciver v. Bolton*, 2 Dallas 114.

<sup>11</sup> *Morton v. Plowman*, 1 Yeates 251; *Bradley v. Flowers*, 4 *Ibid.* 436.

<sup>12</sup> *Knight v. Parry*, 1 Ash. 221.

<sup>13</sup> Act of 20th March 1810, § 25, 5 Sm. Laws 172, *Purd. Dig.* 413, pl. 26.

<sup>14</sup> Act of 20th March 1810, § 22, 5 Sm. Laws 171, *Purd. Dig.* 412, pl. 23; *Johnson v. Hibbard*, 3 Wh. 12; *Cozens v. Dewees*, 2 S. & R. 112; *Silvergood v. Storrick*, 1 Watts 532; *Borland v. Ealy*, 7 Wright 111.

<sup>15</sup> *Commonwealth v. Burkhart*, 11 Harris 521.

ment on *certiorari* in cases of summary conviction, or where extraordinary jurisdiction is given by special statute.<sup>1</sup> Where the act applies, however, it covers every part of the judgment on the *certiorari*, whether as regards reversal, costs, execution, or any other matter.<sup>2</sup>

*Execution.*—On the affirmance or reversal of a judgment, the record is not remitted to the justice, as in cases of writs of error to inferior courts, but execution issues at once from the Common Pleas for the debt, interest, and costs in the former case, or for costs only in the latter, without referring the cause again to the justice.<sup>3</sup> The party in whose favor the judgment has been affirmed, may also take a *scire facias* against the bail upon his recognisance, who, like the bail on a writ of error, is liable, without any previous process being had against the principal.<sup>4</sup> Where the *certiorari*, however, is *non prossed*, the record must be remitted to the justice to be proceeded in: in this respect there is no difference between *certiorari* and a writ of error.<sup>5</sup>

*Costs* on a second trial, after reversal of a judgment on *certiorari*, are regulated by the Act of 1810,<sup>6</sup> which directs that when the plaintiff removes and reverses the justice's proceedings, and on a second trial before him or any other justice, if judgment shall not be obtained for a sum equal to or greater than the original judgment, the plaintiff shall pay all costs accrued on the second trial, as well as those which accrued at the court, including any fees not exceeding \$4, which the defendant may have given his attorney in such trial, together with fifty cents per day to the defendant while attending court in defence of the proceedings; and where the defendant removes and reverses the judgment, and it shall appear that he attended the trial before the justice, or had legal notice to attend the same, and on a final trial being had as aforesaid, the plaintiff shall obtain judgment for a sum equal to or greater than the original judgment, the defendant shall pay all costs accrued on the second trial before the justice of the peace, as well as those which accrued at the court before whom the proceedings had been set aside, including any fees, which the plaintiff may have given to any attorney, not exceeding \$4, to defend the proceedings of the justice, together with fifty cents per day while attending at court on the same; which costs shall be recovered before any justice of the peace, in the same manner as sums of a similar amount are recoverable.

The right to recover the costs in such cases, depends on the relative amount recovered in the first and subsequent judgments, and this provision does not extend, therefore, to the reversal of an execution.<sup>7</sup>

<sup>1</sup> *Zimmerly v. Road Commissioners*, 1 Casey 136; *Commonwealth v. Burkhardt*, 11 Harris 521; *Cooke v. Reinhart*, 1 Rawle 317; *Clark v. Yeat*, 4 Binn. 185; *Essler v. Johnson*, 1 Casey 350.

<sup>2</sup> *Silvergood v. Storrick*, 1 Watts 532.

<sup>3</sup> *Robbins v. Whitman*, 1 Dallas 433; *Welker v. Welker*, 3 Pa. R. 24.

<sup>4</sup> *Smith v. Ramsay*, 6 S. & R. 573.

<sup>5</sup> *Welker v. Welker*, 3 Pa. R. 24.

<sup>6</sup> Sect. 25, 5 Sm. Laws 172, *Purd Dig.* 43. See also *post*, chap. "Costs."

<sup>7</sup> *Atkinson v. Crossland*, 4 Watts 450.

## CHAPTER XXII.

### OF COSTS.

Costs incident to judgment. Final. Interlocutory. Distribution of the general subject. P. 719.

#### SECTION I. OF THE PLAINTIFF'S COSTS. P. 720.

##### 1. *Of the plaintiff's right to costs generally and in particular forms of action.*

No costs at common law.

Costs allowed plaintiff in verdict for damages.

Statute of Gloucester allowing plaintiff's costs.

No costs allowed informer unless given by act.

Costs allowed in action upon statute.

Reason for the distinction.—After statute of Gloucester jury taxed damages and costs, separately.

Costs in ejectment.

Costs in partition.

Costs in scire facias and actions of waste.

The Commonwealth neither receives nor pays costs except where directed by act.

Reason for this.

The United States also exempted from costs.

This exemption founded on sovereignty applies to the sovereign alone.

Actions on official bonds.

Act of March 1824.

Act of June 14th 1836. Quo warranto.

Act of April 16th 1845. Official bonds.

Costs on mandamus.

When plaintiff recovers less than 40 shillings damages, he is entitled to no more costs than damages.

Statute of Car. II., c. 9.

40 shillings equal to \$5.33.

Certificate of judge.

Costs may be recovered on writ of inquiry.

Cases to which the statute does not extend.

When certificate of judge not necessary to entitle plaintiff to costs.

Statute 8 & 9 Will. III., c. 2.

Act of March 27th 1713.

Exceptions to this statute.

Act of March 21st 1806, when costs shall not be recovered under it.

Costs de incremento.

When defendant is entitled to general costs of cause on several issues.

Costs in divorce.

No costs in foreign attachment at common law.

Costs allowed in Pennsylvania.

Costs of feigned issue in Register's Court.

Costs of feigned issue in Common Pleas.

Costs on certiorari.

Costs on mandamus.

Costs in cases of lunacy.

Costs on writ of capias.

Costs on arrest of exempt freeholder.

Assignee's costs on voluntary assignment.

##### 2. *Plaintiff's right to costs in actions within jurisdiction of justice of the peace; and where he recovers a sum less than that required by law to give the court jurisdiction.* P. 730.

General rule.

Reduction by set-off or cross-demand.

When affidavit need not be filed.

When costs in one suit only can be recovered.

Distinction where amount is reduced by direct payment and set-off.

Act of 1810, § 26.

Act of 1814, § 1, 6.

Act of February 13th 1816.

Cases of rent and ground-rent, under Act of 1810.

Act of April 8th 1840.

Jurisdiction of the District Court of the city of Philadelphia.

Jurisdiction of the Supreme Court in city of Philadelphia.

What is "matter in controversy."

#### SECTION II. DEFENDANT'S COSTS. P. 734.

##### 1. *Of defendant's costs generally.* P. 734.

Statute of Gloucester.

Statutes of Elizabeth.

Statute of 8 & 9 Wm. III., c. 11.  
 Act of April 3d 1779. Replevin.  
 Actions of scire facias.  
 Defalcation. Act of 1705.  
 Garnishee's right to costs in foreign attachment.  
 Attachment sur mortgage.  
 Garnishee's right to his expenses and counsel fees.

2. *Where there are several defendants and one or more are acquitted by verdict.* P. 737.

Acquittal of one of several in trespass, assault, false imprisonment, and ejectment.

Judgment by default.  
 Plea pleaded when found for defendant he is entitled to costs.

The statute does not extend to replevin, trespass on the case for tort or trover, nor to action of scire facias.

3. *In case of an equitable plaintiff.* P. 738.

Act of April 23d 1829, makes equitable plaintiff liable for costs.

Party for whose use action is brought is liable for costs.

In case of establishing a will costs must be borne by those having a direct interest in the result.

What costs are included.  
 Costs on audit under exceptions to sheriff's return must be paid by party excepting, if he fails.

Costs in lunacy.  
 Rule in England is that estate of lunatic must pay costs if lunacy is established.

In Pennsylvania courts have control of the costs under our acts.

4. *Security for costs.* P. 740.

Rule of court. District Court.  
 Practice under the rule.  
 Practice in Common Pleas and Supreme Court.

When security will be required.  
 Residence of plaintiffs.  
 Residence of defendants.

Demand for security must be made within a reasonable time.

Must be after bail in bailable actions.  
 Case of infancy.

5. *Of the costs of former actions.* P. 742.

Court will stay proceedings until all costs in former action are paid.

Both actions must be for the same cause.  
 Proceedings in ejectment.

Application for stay must be made to court in banc.

Refusal of court to stay is not ground for writ of error.

Act of April 11th 1825, and August 2d 1847.

6. *Of costs after tender and payment of money into court.* P. 743.

Act of 1705, § 2.

Tender previous to institution of suit.  
 Payment into court.

Payment must be made under a rule.

Payment into court after suit brought, must be with costs up to time of payment.

Where plaintiff becomes nonsuited, defendant is entitled to costs.

After payment into court defendant cannot take it out.

Rule in the Common Pleas.

SECTION III. OF COSTS ON A WRIT OF ERROR. P. 744.

No costs were recoverable on a writ of error by Statute of Gloucester.

Costs under 8 & 9 Wm. III., c. 11, s. 10, given on affirmance of judgment.

Supreme Court may impose terms as to costs.

Where no terms are imposed, costs abide the final event of the suit.

SECTION IV. COSTS ON APPEAL FROM ALDERMEN AND JUSTICES OF THE PEACE. P. 746.

Act of March 20th 1810.

Act of March 20th 1845.

Appeal from judgment against plaintiff.  
 When costs may be recovered on this appeal.

Costs on award and arbitration.  
 Costs on affirmance of justices.

Judgment where same evidence before both tribunals.

The effect of the production of new evidence in Common Pleas.

Costs on appeals now regulated by Act of April 9th 1833.

Sections of the act and cases under them.

General principle is that costs being creatures of the statute, defendant must pay them on final judgment, unless he brings himself within the exceptions.

What constitutes a sufficient tender to exempt defendant from costs under Statute of 1833.

Trespass and trover are within the act.

Act of March 20th 1845, its effect upon awards of arbitrators—its effect upon judgments of aldermen and justices of the peace.

SECTION V. COSTS OF REFERENCE AND ARBITRATION. P. 751.

1. *Of costs of voluntary arbitration.* P. 751.

Under the English law.

Under the Act of 1836.

When costs depend on the terms of submission.

When costs depend on the terms of the rule of reference.

Arbitrators may order costs to be paid by either party.

Law of reference under Act of 1705.

Costs of referees under Act of 1806.

Exceptions under this act.

**2. Costs of compulsory arbitration. P. 754.**

Costs follow the jurisdiction of the court.

Act of June 16th 1836.

Municipal corporations within the act.

Appellant must pay costs of former award which has been set aside in absence of terms as to costs.

Costs abide the final event.

Payment of costs may be enforced.

The system provided by statute as to the payment of costs.

Condition of the recognisance for costs.

Appeal from prothonotary's taxation of costs.

Each party may appeal from an award and have a jury trial.

Rules for determining when appellant shall recover his costs, and when defendant.

General rule is that where judgment of an inferior court is reversed on error, costs in error are not recoverable; where judgment is affirmed costs are recovered.

The effect of Act of July 12th 1842 on costs on appeal from award.

Act of March 20th 1845.

**SECTION VI. OF COSTS IN ACTIONS BY AND AGAINST PARTICULAR PERSONS. P. 759.**

Costs in actions by and against executors and administrators.

When liable *de bonis propriis*.

Exempt from costs on appeal.

Committee of lunatic is *prima facie* liable for costs.

Infant defendant liable for costs.

Infant plaintiff if he fails defendant is entitled to costs, and may have attachment to enforce them against guardian or next friend.

When guardian may appeal.

**SECTION VII. OF DOUBLE AND TREBLE COSTS. P. 763.**

Generally party is entitled to single costs only.

When party is entitled to double costs, and what are double costs.

Double costs in England and in Pennsylvania differ.

Double costs in Pennsylvania.

**SECTION VIII. OF THE TAXATION AND RECOVERY OF COSTS. P. 764.**

What taxation of costs is.

Plaintiff's or defendant's bill must be filed in the office.

If objected to must be taxed by prothonotary under rule of court.

Rule in the Common Pleas and District Court.

The fee-bill of February 22d 1821.

Act of March 21st 1806, § 5.

Act of 1814, § 26, 27.

Act of April 11th 1825.

Act of May 6th 1844, § 8.

Attendance of witnesses must be proved if disputed.

Fees of witnesses taxable.

Per diem and mileage allowance.

Costs abide event when cause is a remanet.

Party dissatisfied with prothonotary's taxation of costs may appeal to court.

Method of enforcing payment of costs.

Order for payment of costs may be enforced by attachment.

Rules for payment of costs on judgments must be granted on motion in open court.

Set-off in case of costs.

Plaintiff is eventually liable to officers of court for fees prescribed by law, and they are frequently paid at the time the services are rendered.

Prothonotary may maintain suit for his fees.

INCIDENT to the judgment are costs or allowances to a party for expenses incurred in conducting his suit, or for which he is responsible to the officers of the court for services rendered to him. They are called final, in contradistinction from interlocutory costs, or such as are awarded on interlocutory matters arising in the course of the suit, and which have already been considered whilst treating of the matters to which they relate. The former, or such as depend on the final event of the suit, will be the subject of the present chapter.

We shall proceed to consider the subject under the following heads:—

**I. Of the plaintiff's costs.**

1. Of the plaintiff's right to costs generally, and in particular forms of action.
2. Of the plaintiff's right to costs in actions within the jurisdiction of a justice of the peace, and where he recovers

a sum less than that required by law to give the court jurisdiction.

II. *Of the defendant's costs.*

1. Of the defendant's costs generally.
2. Of costs where there are several defendants and one or more are acquitted by verdict.
3. Of the defendant's right to costs as against an equitable plaintiff.
4. Of security for costs.
5. Of the costs of former actions.
6. Of costs after tender and payment of money into court.

III. *Of costs on a writ of error.*

IV. *Of costs on appeal from aldermen and justices of the peace.*

V. *Of costs of reference and arbitration.*

1. Voluntary.
2. Compulsory.

VI. *Of costs in actions by and against particular persons.*

VII. *Of double and treble costs.*

VIII. *Of the taxation and recovery of costs.*

## SECTION I.

### OF THE PLAINTIFF'S COSTS.

1. *Of the plaintiff's right to costs generally, and in particular forms of action.*

At common law, neither the plaintiff nor the defendant was entitled to costs. In all actions, however, in which damages were recoverable, the plaintiff, if he had a verdict, was in effect allowed his costs; for the jury always computed them in damages. But the defendant was wholly without remedy for any expenses he had been put to, if he had a verdict, or the plaintiff were nonsuit; the amercement to which the plaintiff was subject in such a case, *pro falso clamore suo*, going entirely to the king. So that costs in their origin were rather a punishment of the party paying them, than a recompense to the party receiving them.<sup>1</sup>

This was remedied, however, as to plaintiffs, by the Statute of Gloucester, 6 Edw. I., c. 1,<sup>2</sup> by which it is provided, "that the demandant may recover against the tenant the costs of his writ purchased, together with his damages aforesaid. And this act shall hold place in all cases where the party is to recover damages."

Though the statute only mentions the cost of the "writ purchased," the construction has been, that it extends to all the costs of the suit.<sup>3</sup> And it is now settled that the words, "in all cases," are general words, and that the plaintiff is entitled to costs in all actions in which damages are recoverable at the common law, or were given by the Statute of Gloucester; and also where damages are given by

<sup>1</sup> *Musser v. Good*, 11 S. & R. 250.

*Wils.* 91; *Tappan v. The Columbia Bridge Co.*, 4 P. L. J. 224.

<sup>2</sup> *Rob. Dig.* 107.

<sup>3</sup> 2 *Inst.* 288; *Sayer on Costs* 4; 2



any subsequent statute, although costs be not mentioned in the statute.<sup>1</sup>

Thus, in an action of debt upon a statute by a party aggrieved, for a certain penalty, the plaintiff shall recover costs of suit, although no costs are annexed by the act under which the action is brought.<sup>2</sup> But no costs are recoverable by a common informer or prosecutor *qui tam*, unless costs are expressly given by the act imposing the penalty.<sup>3</sup> The reason of the distinction being that, in an action by a party aggrieved for the penalty, a right vests in the plaintiff from the moment the offence is committed, for the detention which he is entitled to damages in debt; but in the case of a common informer or prosecutor *qui tam*, it is different, as he has no interest until judgment, and he is therefore not entitled to damages for the detention.<sup>4</sup> After the Statute of Gloucester, the judges began to make it a rule, for the better execution of the statute, that the jury should tax the damages and costs separately; and when it was evident that the costs given by the jury were too little to answer the costs of the suit, the plaintiff prayed that the officer might tax the costs inserted in the judgment; and this was the origin of costs *de incremento*.<sup>5</sup> Thus, in giving their verdict in actions of debt or ejectment, the jury say they find for the plaintiff six cents damages and six cents costs, in order that the court may consistently add the increase of costs to the damages. In cases where the verdict is for damages, they find so much damages and six cents costs.<sup>6</sup> In ejectment, the plaintiff is entitled to costs if he obtain a verdict; and costs are awarded by the court on reports of referees, though they are, in Pennsylvania, seldom or never specified in ejectment causes.<sup>7</sup> When the jury are *ex officio* bound to give costs, and omit to do so, the court may supply the deficiency.<sup>8</sup> And if the jury assess costs in a case in which they are not recoverable, the judgment is to be entered without costs.<sup>9</sup>

The Statute of Gloucester did not extend to cases in which no damages were recoverable by the common law. Thus in partition, although the writ and count is *ad damnum*, yet as no damages were recoverable, the plaintiff was not entitled to costs.<sup>10</sup> But by the third section of the Act of 1835,<sup>11</sup> it is enacted that the costs in partition shall be paid by all the parties in proportion to their several interests; and this is to include witness fees.<sup>12</sup>

So also in *scire facias* and actions of waste; the right to receive costs was given by the statute 8 & 9 William III., c. 11,<sup>13</sup> which

<sup>1</sup> 2 Wils. 91; Barnes 151; 3 Burr. 1723; Sayer on Costs 10; 1 T. R. 71; 6 T. R. 355; 7 Ibid. 267.

<sup>2</sup> 1 H. Bl. 13; 7 T. R. 268; Norris v. Pilmore, 1 Yeates 405; Ritchie v. Shannon, 2 Rawle 196.

<sup>3</sup> 1 Salk. 206; 1 Rol. Abr. 574; Bul-ler's N. P. 33.

<sup>4</sup> Norris v. Pilmore, 1 Yeates 405; Ritchie v. Shannon, 2 Rawle 196.

<sup>5</sup> See Brightly on Costs, p. 14.

<sup>6</sup> Vide Brac. L. Mis. 193.

<sup>7</sup> Harvey v. Snow, 1 Yeates 156.

<sup>8</sup> Zell v. Arnold, 2 Pa. R. 292; Bel-las v. Levy, 2 Rawle 21; 1 Bingh. 182.

<sup>9</sup> 2 Saund. 257; Guier v. M'Faden, 2 Binn. 587.

<sup>10</sup> Noy. 68; Stewart v. Baldwin, 1 Pa. R. 461.

<sup>11</sup> Act 11th April, Dunlop Dig., ed. 1849, p. 671.

<sup>12</sup> St. Peter's Church v. Zion Church, 4 P. L. J. 134.

<sup>13</sup> Rob. Dig. 140.

enacted that "the plaintiff obtaining judgment or any award of execution after plea pleaded, or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs and have execution for the same in like manner as aforesaid."

Under this statute, a plaintiff in *scire facias* is entitled to costs only in the cases provided for by the statute, that is to say, where he obtains judgment after plea pleaded, or demurrer joined; and as costs are the creatures of the statute, and are in the nature of a penalty in the unsuccessful party, and the statutes imposing them are to be construed strictly,<sup>1</sup> it is held under this statute that, where the defendant in an action of *scire facias* suffers judgment by default, the plaintiff cannot recover costs, as the case is not within the statute.<sup>2</sup> But costs are taxable in every proceeding by *scire facias*, whether an original suit or not; and where a terre-tenant who was made party to a *scire facias* to revive a judgment pleaded to the suit, whereby costs were incurred, and judgment was entered for the plaintiff, the terre-tenant was held to be liable personally for the costs.<sup>3</sup>

In any case where damages would have been recoverable at common law, the plaintiff is entitled to costs, notwithstanding that a new and different mode of proceeding has been introduced by statute. Therefore, under the General Plank-Road Act of Pennsylvania of 7th April 1849, which provides for the assessment of damages under the act by freeholders, upon which assessment judgment is to be entered before a justice of the peace with an appeal, as in ordinary cases, a plaintiff succeeding in an appeal is entitled to costs.<sup>4</sup>

The commonwealth neither receives nor pays costs on her own prosecutions, whether civil or criminal, except where directed by Act of Assembly. This exemption, whether it be called prerogative or privilege, is founded on the sovereign character of the State, amenable to no judicial tribunal, and subject to no process.<sup>5</sup> In like manner, the United States are exempted from liability to the payment of costs.<sup>6</sup>

But this exemption of the State is not communicated nor communicable to those who sue in her name and for *their own exclusive benefit*, the action not being hers, nor under *her control*. Therefore, in actions on official bonds sued in the name of the commonwealth, for the use of parties aggrieved, or in actions brought by an assignee of the State, the court will look to the real party on the record, and compel him to pay the costs.<sup>7</sup> The Act of March 1824<sup>8</sup>

<sup>1</sup> *Maus v. Maus*, 10 Watts 90; *Commonwealth v. Harkness*, 4 Binn. 194; *Ramsay v. Alexander*, 5 S. & R. 344; *Clemens v. Commonwealth*, 7 Watts 485; *Salk*, 206; 3 *Burr*, 1287.

<sup>2</sup> 1 *Bing*, 182; *Arch. Pr.* 289; 3 *Bos. & Pul.* 14.

<sup>3</sup> *Haskins v. Low*, 5 *Harris* 64.

<sup>4</sup> *Beardsley v. The Plank Road Co.*, 2 *Am. Law Reg.* 660.

<sup>5</sup> *Commonwealth v. Commissioners of County of Philadelphia*, 8 S. & R. 151; *Commonwealth v. Johnson*, 5 *Ibid.*

195; *Irwin v. The Commissioners of Northumberland County*, 1 *Ibid.* 505; *McKeehan v. The Commonwealth*, 3 *Barr* 153.

<sup>6</sup> *United States v. Hooe et al.*, 3 *Cranch* 73; *United States v. Barker*, 2 *Wheat.* 395.

<sup>7</sup> *Commonwealth v. County Commissioners*, 8 S. & R. 153; see also *Stat. 24 H. VIII. c. 8*; *Rob. Dig.* 123.

<sup>8</sup> *Pamph. L.* 32; *Dunlop Dig. ed.* 1849, 426.

forms, however, an exception to the rule above laid down. The second section directing the method of proceeding against retailers of foreign merchandise, for the duty thereon, provides, that "upon an appeal by a defendant in such action, the jury or arbitrators trying the cause shall decide whether the party appealing or the commonwealth shall pay the costs of suit; and when the decision is against the commonwealth, the costs shall be paid out of the county treasury; but in no case shall the commonwealth pay costs, except where the party appealing is not a retailer of foreign merchandise; or has not produced any other testimony on the appeal than was produced before the justice."

*Quo warranto*.—And the 12th section of the Act of 14th June 1836, in relation to writs of *quo warranto*,<sup>1</sup> provides, "that if the proceedings shall be instituted by the attorney-general at his own instance, it shall be lawful for the court, in their discretion, on giving judgment for the defendant, to order that the costs be paid by the county in which the matters complained of were alleged to have taken place.<sup>1</sup>

*Bonds of public officers*.—And in actions brought by the commonwealth upon the official bonds of prothonotaries, registers, and recorders, the 10th section of the Act of 16th April 1845,<sup>2</sup> directs judgment to be entered for the commonwealth with costs.

*Mandamus*.—By the Act of June 14th 1836, § 24, costs are recoverable with damages where the person suing out the *mandamus* has judgment thereon. And by the 29th section, where peremptory *mandamus* is awarded, the party is entitled to costs although he should not proceed to the recovery of damages; and by section 29 the defendant on judgment in his favor is allowed costs; and by section 30, the costs of the application for this writ may be given or refused according to the discretion of the court; and execution for damages and costs when recovered may be levied as in other cases.<sup>3</sup>

But the Statute of Gloucester, giving costs to the plaintiff in all cases where he recovered damages, as above-mentioned, was found to have the effect of encouraging suits for very trifling causes; and the legislature, therefore, were obliged to interfere, and have in some measure remedied the evil, by enacting that if the plaintiff, in certain cases, recover less than 40s. damages, he shall be entitled to no more costs than damages.

Thus in trespass, the general rule is that the plaintiff shall have costs, if he have a verdict, however trifling the damages may be. This rule, however, is considerably narrowed by the following statutes. By the statute 22 and 23 C. II., c. 9, which is in force in Pennsylvania, it is provided, that<sup>4</sup> in all actions of trespass, assault and battery, and other personal actions, wherein the judge at the trial shall not certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved, or that the freehold or title of the land was chiefly in question, if the jury

<sup>1</sup> Pamph. L. 622; Dunlop Dig., ed. 1849, 1053.

1849, 767, Purd. Dig. 823.

<sup>2</sup> Pamph. L. 626, Purd. Dig. 688.

<sup>3</sup> Pamph. L. 534; Dunlop Dig., ed.

<sup>4</sup> Rob. Dig. 138.

find damages under 40s. the plaintiff shall recover no more costs than damages.

Notwithstanding the generality of the words "other personal actions," this statute has always been confined to actions of assault and battery, and to such personal actions as relate to the freehold, or to things fixed to the freehold, that is, to cases where the freehold may by presumption come in question,<sup>1</sup> and the forty shillings damages in trespass, which entitle the plaintiff to recover full costs, are to be estimated in Pennsylvania currency, and are equal to \$5.33.<sup>2</sup>

The plaintiff is not prevented from recovering full costs, although the damages do not amount to forty shillings, upon a writ of inquiry, as the statute does not extend to that case.<sup>3</sup> And to entitle the plaintiff to full costs in assault and battery, where the damages found by the jury are under forty shillings, the judge must certify that both the assault and the battery were proved.<sup>4</sup> And where the action is in form an action of assault and battery, yet if it is only maintainable in respect of special damages resulting from the offence, it is not within the statute;<sup>5</sup> and the statute does not extend to an action of assault and battery, *per quod servitium amisit*, nor to trespass and assault upon, and criminal conversation with, the plaintiff's wife, nor to assault or false imprisonment.<sup>6</sup> But in an action for assault and battery, and tearing the plaintiff's clothes, if the plaintiff have a verdict for less than 40s. he shall have no more costs than damages, unless the judges certify; because the tearing of the clothes is a mere consequence of the battery, and not a substantive cause of action.<sup>7</sup> Even in cases clearly within the statute, however, if the defendant plead a justification, the plaintiff shall have full costs, although the verdict be for less than 40s.;<sup>8</sup> and as under the plea of *non cul.* with leave to give the special matter in evidence, the defendant may by our practice prove everything that amounts to a justification, it is unnecessary that the justification should appear from the record if the defendant actually justified.<sup>9</sup> But where the defendant only justifies the assault, the plaintiff cannot have full costs without a certificate.<sup>10</sup> And where there is a verdict for the defendant upon a plea of justification, and a verdict against him upon the plea of not guilty, the plaintiff is not entitled to full costs without a certificate.<sup>11</sup>

In trespass *quare clausum fregit*, the plaintiff is entitled to full costs, without a certificate, although the damages be under forty shillings, where it appears from the pleadings that the freehold or title to the land, could not have come into question.<sup>12</sup> And so, also,

<sup>1</sup> Salk. 308; 3 Selwyn 1134; Bull. N. P. 329; 1 Taunt. 357.

<sup>2</sup> Chapman v. Calder, 2 Harris 357.

<sup>3</sup> 2 Bull. N. P. 329.

<sup>4</sup> 2 Lev. 102.

<sup>5</sup> 3 Keb. 184; 1 Salk. 208; 1 Stra. 192; 6 Dowl. 561.

<sup>6</sup> Str. 630-4, 504, 551, 645; 3 Wils. 319; and see 2 Arch. Pr. 1142; 2 Bl. 854.

<sup>7</sup> 5 T. R. 482; 1 H. Bl. 291.

<sup>8</sup> Fisher v. Johnson, 1 Browne 197; 1 East 350; 3 Barn. & Ald. 443; 4 Taunt. 98.

<sup>9</sup> Fisher v. Johnson, 1 Browne 197; Wagner v. Day, D. C. Phila. 1827, MS.

<sup>10</sup> 3 T. R. 391.

<sup>11</sup> 1 Stra. 577.

<sup>12</sup> Ibid. 534, 551.

where it appears on the face of the pleadings, or from the nature of the case, that the freehold or title to the land must have come into question, a certificate is not always necessary to entitle the plaintiff to full costs.<sup>1</sup> And where, in a declaration for trespass upon land, a count is added for injury to personal property, the plaintiff is entitled to full costs without a certificate.<sup>2</sup> And where, in an action of trespass *quare clausum fregit*, and carrying away goods, a recovery of five dollars damages was had, the plaintiff was held to be entitled to full costs.<sup>3</sup> But where the further injury is laid by way of aggravation of the trespass on the land, the plaintiff is not entitled to costs without a certificate;<sup>4</sup> and so, also, where the *asportavit* is only alleged by way of description of the manner in which the injury to land was committed.<sup>5</sup>

But by 8 & 9 W. III. c. 11,<sup>6</sup> if the judge certify that the trespass was wilful and malicious, the plaintiff shall have his full costs, although the verdict be for less than 40s.<sup>7</sup> Where the trespass has been committed after notice, the judge usually certifies under this act;<sup>8</sup> but it is perfectly discretionary with him to do so or not,<sup>9</sup> and he will not certify if it appear that the trespass was committed for the purpose of asserting a disputed right.<sup>10</sup> The certificate in this case may, it seems, be granted out of court; and the judge may certify at any time between verdict and final judgment.<sup>11</sup>

The plaintiff's general right to costs has been further restrained by the 4th section of our Act of Limitations, passed March 27th 1713,<sup>12</sup> copied from the 21st of James I., c. 16, which declares that in all actions upon the case for "slanderous words," if the damages found be under 40s., the plaintiff shall recover no more costs than damages. This statute, however, extends only to such words as are actionable of themselves;<sup>13</sup> and it is settled that the statute does not extend to slander of title, for that is not so properly a slander as a cause of damage;<sup>14</sup> and where the words are not actionable in themselves, but the special damage is the gist of the action, the plaintiff is entitled to full costs, although the damages may be under 40s.;<sup>15</sup> but where the words in themselves are actionable, but the special damage is laid by way of aggravation, and as the essential cause of action, the plaintiff is not entitled to more costs than damages.<sup>16</sup>

A plea of justification in slander will not take it out of the statute.<sup>17</sup> If damages under 40s. be recovered in slander, and judgment entered for costs, on error brought by the defendant below, the

<sup>1</sup> Brightly on Costs 36; 1 Freeman 215; 2 Mod. 142; Gilb. H. C. P. 263.

<sup>2</sup> Sayer on Costs 39; 1 Stra. 633.

<sup>3</sup> Williams v. Glenn, 2 Pa. R. 137; and see Chapman v. Calder, 2 Harris 359.

<sup>4</sup> 3 Burr. 1282.

<sup>5</sup> 1 Doug. 780.

<sup>6</sup> Rob. Dig. 139.

<sup>7</sup> See Hullock 94, 99.

<sup>8</sup> See 6 T. R. 11, 3 East 495.

<sup>9</sup> 3 East 495.

<sup>10</sup> Ibid.

<sup>11</sup> 1 T. R. 636; 4 D. & R. 147; 2 B. & C. 580.

<sup>12</sup> 1 Sm. Laws 77, Purd. Dig. 916.

<sup>13</sup> 2 Bac. Abr. "Costs," B.; 2 Hullock 27, 34.

<sup>14</sup> Cro. Car. 141; Str. 645; see Rob. Dig. 119.

<sup>15</sup> 1 Salk. 206; 7 Mod. 129; Barnes 135; 2 W. Bl. 1062.

<sup>16</sup> 2 W. Bl. 1062; 1 Dowl. P. C. 406; 3 Burr. 1688; Barnes 132.

<sup>17</sup> 2 Wilson 258; 4 East 567.

judgment will be reversed *in toto*, and *venire facias de novo* awarded.<sup>1</sup>

Where a plaintiff appealed from an award of arbitrators in slander, allowing six cents damages, and the jury gave \$5 damages, it was held that though he could not recover more costs than damages, yet he was entitled to recover back the costs paid by him on the appeal from the award.<sup>2</sup> In actions of slander, arbitrators and juries are not restricted as to costs; where they find damages under 40s., they may find twenty cents damages and full costs, or they may find that each party pay half of all the costs.<sup>3</sup>

In all other actions on the case for torts, the plaintiff is entitled to his full costs of suit, however trifling the damages may be.

By the Act of March 21st 1806, § 5,<sup>4</sup> it is provided, that if the plaintiff on the trial does not recover more than the amount for which the defendant was willing to confess judgment, no costs shall be recovered that accrue subsequent to the offer of confession of judgment, except the costs of the execution when the same may be necessary.

In England, the power of the judges is taken away by the statute as to giving costs *de incremento*, where the damages are under forty shillings, but although the court cannot increase the costs, the jury are not bound by the statute, and, therefore, they may give ten pounds costs, where they give but ten pence damages; so where they give less than 40s. they may give full costs;<sup>5</sup> and this rule has been adopted by the Supreme Court in construing our Act of Assembly.<sup>6</sup> The true reason why the court is bound while the jury are not, seems to be, that there being no measure of damages in those cases which fall within these statutes, the jury are not bound to give damages *eo nomine*, but may substantially do the same thing in another form, by increasing the costs to the amount of the damages intended to be given.<sup>7</sup> The construction of the statute always has been, that although the court cannot add the costs *de incremento*, yet the jury may find any sum in costs they please.<sup>8</sup> Thus, in trespass *quare clausum fregit*, the jury may give full costs, although they find damages under 40s., and the judge does not certify that the freehold was in question.<sup>9</sup> This construction will not, however, be extended beyond adjudged cases, and the propriety of having extended it so far is reasonably doubted.<sup>10</sup>

But neither court nor jury can give costs if the legislature declare, in express terms, that they cannot be recovered.<sup>11</sup>

If a plaintiff in an action of covenant to recover arrears of ground-

<sup>1</sup> Gailey v. Beard, 4 Yeates 546; and see Allen v. Flock, 2 Pa. R. 159.

<sup>2</sup> Guy v. Wilkeson, 2 Watts 133.

<sup>3</sup> Willet *et ux.* v. Seville, 2 Grant's Cases 388.

<sup>4</sup> 4 Sm. Laws 328, Purd. Dig. 805.

<sup>5</sup> 1 Salk. 207; Cornogg v. Abraham, 1 Yeates 253.

<sup>6</sup> Stuart v. Harkins, 3 Binn. 321, and cases cited in note 4, *post*, p. 727.

<sup>7</sup> Hinds v. Knox, 4 S. & R. 419.

<sup>8</sup> 6 Vin. "Costs," L. pl. 36.

<sup>9</sup> Hinds v. Knox, 4 S. & R. 417; Wilkinson v. Grey, 14 Ibid. 345; Williams v. Glenn, 2 Pa. R. 137.

<sup>10</sup> *Vide* Stuart v. Harkins, 3 Binn. 323; Lewis v. England, 4 Ibid. 5; Lentz v. Stroh, 6 S. & R. 39.

<sup>11</sup> Lewis v. England, 4 Binn. 5; Hinds v. Knox, 4 S. & R. 417; Fortune v. Tyler, 1 Ash. 11.

rent, chooses to proceed under the Act of April 8th 1840, in order to obtain judgment on two "*nihils*" in the Court of Common Pleas, he must pay his own costs.<sup>1</sup>

The term *costs* ordinarily includes officers' fees, as well as the party's own charges for witnesses, where witnesses can legally be called and examined.<sup>2</sup> By the 4th section of the Act of 27th March 1848, relative to the Pennsylvania Railroad, it is provided that if any damages be awarded and the report be confirmed, judgment shall be entered thereon and execution may issue for the sum awarded; and the costs and expenses incurred shall be defrayed by the company: *Held*, that this provision included the petitioners' bill of costs for service on the viewers of notice of their appointment, and for mileage in such service; also for serving *subpoenas* on their witnesses and mileage, and for the attendance of their witnesses and their mileage.<sup>3</sup>

Where the jury or arbitrators find for the plaintiff with *full costs* or *costs of suit*, the plaintiff is entitled to have judgment entered for full costs.<sup>4</sup> It was held that where the verdict finds only *costs*, the plaintiff is only entitled to costs to the amount of damages;<sup>5</sup> but a later case seems to have destroyed the distinction—as in an award in slander being for the plaintiff in "the sum of one dollar damages, and that the defendant pay the costs," the plaintiff was held entitled to the full costs of suit.<sup>6</sup>

In the District Court for the City and County of Philadelphia, it is provided by rule of court, that if the defendant makes an affidavit of defence as to part and the plaintiff will not accept judgment for the sum so admitted, but proceeds and recovers a sum no greater than such admitted amount, the plaintiff shall pay all costs accruing after such affidavit.<sup>7</sup> And a similar rule exists in the Court of Common Pleas.

Where there are several issues, and the substantial issue is found for the plaintiff, he is entitled to the general costs of the cause, with the exception of such parts of the costs of witnesses, papers, &c., as are applicable only to the issue on which the defendants have succeeded.<sup>8</sup> And this was decided to be the practice in Pennsylvania, in a case which occurred in the Common Pleas of Lancaster, in which the prothonotary was directed to strike out of the plaintiff's bill all costs not properly applicable to the count in which he recovered.<sup>9</sup> And the general principle established by the cases is, that where there are several issues of fact upon several counts in the declaration, and a verdict passes for the plaintiff on any one of the issues, he is entitled to a general judgment for costs, and the defend-

<sup>1</sup> Janney v. Funston, 1 Phila. Rep. 373.

<sup>2</sup> Pennsylvania Railroad Co. v. Keiffer, 10 Harris 356.

<sup>3</sup> Ibid.

<sup>4</sup> Hinds v. Knox, 4 S. & R. 417; Wilkinson v. Grey, 14 Ibid. 345; Ellison v. Buckley, 6 Wright 281.

<sup>5</sup> Stuart v. Harkins, 3 Binn. 321;

Lewis v. England, 4 Ibid. 15; Lentz v. Siroh, 6 S. & R. 39; Gower v. Clayton, Ibid. 85.

<sup>6</sup> Moon v. Long, 2 Jones 207.

<sup>7</sup> Rule IV., Walker's Rules, p. 46, ed. 1847, C. P., p. 2.

<sup>8</sup> 3 Dowl. 687; 1 Ibid. 533.

<sup>9</sup> Northampton Bank v. Winder, 5 P. L. J. 94.

ant is not entitled to costs on the counts determined in his favor.<sup>1</sup> This practice, however, in England, has been altered by rule giving the defendant costs on the issues on which he succeeds.<sup>2</sup>

When the defendant pays the debt after suit brought, the plaintiff is entitled to judgment for costs.<sup>3</sup> A judgment for plaintiff on a conditional verdict in ejectment, is for costs as well as for the land, and if it become absolute the plaintiff is entitled to delivery of the land as well as process for costs.<sup>4</sup>

Where a legal plaintiff has no notice of the use of his name, or the costs should be paid by the use party, the court may upon application direct the *fi. fa.* so to issue.<sup>5</sup> Interest is not allowed on costs upon a judgment, unless they have been actually paid, and then only from the time of payment.<sup>6</sup>

And where payment was made after a summons had issued, and had been placed in the hands of the sheriff, but which had not been served, it was held that the plaintiff was entitled to receive the amount paid by him to the sheriff for the service of the writ.<sup>7</sup>

A plaintiff in ejectment, who has conveyed after action brought, cannot prosecute a pending ejectment to recover the costs already incurred.<sup>8</sup>

In proceedings for *divorce* under the Act of 13th of March 1815,<sup>9</sup> the court has power to award costs to the party in whose behalf the sentence or decree passes, or that each party shall pay his or her own costs, as to them shall appear reasonable and just. So on dissolving domestic attachment.<sup>10</sup> And on bills of discovery in aid of execution.<sup>11</sup> And in actions against aldermen for refusing to pay over moneys collected.<sup>12</sup>

A husband who is successful in obtaining a divorce cannot be decreed to pay the costs.<sup>13</sup> If the wife, who is the sole party defendant in the issue tried, obtains a verdict in her favor, she is entitled to recover her costs from the plaintiff.<sup>14</sup>

In *foreign attachment*, the general rule is that no costs are allowed to either party.<sup>15</sup> But in Pennsylvania, the plaintiff's right to costs, as against the defendant, is provided for by the 59th section of the Act of 13th June 1836;<sup>16</sup> and as against the garnishee refusing to answer by the 57th section of the same act.<sup>17</sup>

Where a *feigned issue* is directed by the *Register's Court*, to try the validity of a will, the costs of the Register's Court depend on the event of the verdict; and where there had been a trial of a feigned issue, and the judgment was afterwards reversed, and a

<sup>1</sup> 2 Doug. 677; 5 East 261; 2 B. & P. 330; 6 T. R. 599; 2 Burr. 1232; 1 Brod. & Bingh. 224.

<sup>2</sup> Rule F. H. T. 2 W. 4, r. 74.

<sup>3</sup> Wagner v. Wagner, 9 Barr 214.

<sup>4</sup> Bradley v. O'Donnell, 4 Wright 479.

<sup>5</sup> Gifford v. Gifford, 3 Casey 202.

<sup>6</sup> Rogers v. Burns, Ibid. 525.

<sup>7</sup> Drew v. Conrad, D. C. C. P., May 12th 1849, MS.

<sup>8</sup> Blackmore v. Gregg, 10 Watts 226.

<sup>9</sup> Dunlop Dig., ed. 1849, 321; Purd. Dig. 348, and cases cited in note (d).

<sup>10</sup> Purd. Dig. 355, Pamph. L., 1836, 615, § 40.

<sup>11</sup> Purd. Dig. 407, Pamph. L., 1836, 764, § 18.

<sup>12</sup> Purd. Dig. 608, § 123, Pamph. L., 1820, § 8; 7 Smith 310.

<sup>13</sup> Shoop's Appeal, 10 Casey 233.

<sup>14</sup> Murray v. Keyes *et ux.*, 11 Ibid. 384.

<sup>15</sup> Serjeant on Attachment 130.

<sup>16</sup> Pamph. L. 582; Purd. Dig. 494.

<sup>17</sup> As to the garnishee's right to costs, see *post*, "Defendant's Costs," 734-6.



second trial took place, in which the same party was successful, the court refused to allow him the costs of the first trial.<sup>1</sup>

And so also where a *feigned issue* is ordered by a *Court of Common Law*,<sup>2</sup> and where a feigned issue is directed to try disputed facts arising on the distribution of the proceeds of a judicial sale of land, the costs are to be distributed among the several creditors, in proportion to the amounts to be received by each;<sup>3</sup> and the costs of an issue *devisavit vel non* are to be borne by the parties to it, and not by the estate.<sup>4</sup>

*Costs on certiorari.*—By the Act of March 1810, § 25,<sup>5</sup> on removal by *certiorari* at the instance of the plaintiff, where the proceedings are set aside and a second trial had, if judgment is not obtained for an equal or greater sum than the judgment which was set aside, the plaintiff shall pay all costs accrued on the second trial as well as those which accrued at the court before whom the proceedings had been set aside, together with an attorney's fee and *per diem*, as provided in the act, and where the proceedings are removed at the instance of the defendant and he fails, the plaintiff is entitled to like costs.

*Costs in cases of lunacy.*—By Act of April 16th 1849, § 2,<sup>6</sup> it is provided that the Court of Common Pleas out of which any commission *de lunatico inquirendo* may issue, shall direct who shall pay the costs attendant upon the execution of such commission.

In England the general rule is to allow the costs of a commission of lunacy out of the estate of the lunatic, if the lunacy be established; otherwise no costs will be allowed to the party taking out the commission. And the Court of Common Pleas, where there is no certificate, as provided by the Act of 1836, that there was not *probable cause* for the application, may direct the payment of the costs by the lunatic *before the proceeding is determined*; such order, however, being but interlocutory, will not prevent the court from directing reimbursement, or making a different decree on the determination of the case.<sup>7</sup>

*Costs on writ of capias.*—By the Act of June 13th 1836, § 29,<sup>8</sup> the court from which any original or special writ of *capias ad respondendum* shall issue, have power to inquire into the cause of action and to quash the writ with or without costs.

*Costs in case of arrest of exempt freeholder.*—By the Act of March 20th 1725, § 3,<sup>9</sup> a freeholder exempt from arrest where the court abates the writ, is allowed 80s. costs, and for the non-payment thereof the court is authorized to issue an attachment.

*Assignees for benefit of creditors may appeal without payment of costs.*—By the 10th section of the Act of June 11th 1840,<sup>10</sup> assignees for the benefit of creditors may appeal without payment of costs, the provisions of the Act of June 16th 1836 being extended to them for this purpose.

<sup>1</sup> Havard v. Davis, 1 Browne 334.

<sup>2</sup> Snyder v. Kunkleman, 2 Watts 426.

<sup>3</sup> Cowden's Estate, 1 Barr 283.

<sup>4</sup> Koppenhaffer v. Isaacs, 7 Watts 170.

<sup>5</sup> 5 Smith 173; Purd. Dig. 413.

<sup>6</sup> Pamph. L. 663; Purd. Dig. 681.

<sup>7</sup> Clark's Case, 10 Harris 466; Wier

v. Myers, 10 Casey 377.

<sup>8</sup> Pamph. L. 577; Purd. Dig. 35.

<sup>9</sup> 1 Smith 156; Purd. Dig. 36.

<sup>10</sup> Purd. Dig. 61, § 15; Pamph. L. 691.

- 2: *Of the plaintiff's right to costs in actions within the jurisdiction of a justice of the peace; and where he recovers a sum less than that required by law to give the court jurisdiction.*

The general rule, established by the Statute of Gloucester, that the plaintiff is entitled to costs in all cases where he recovers damages, has been further restrained by the Act of 20th March 1810,<sup>1</sup> giving jurisdiction to justices of the peace in all causes of action arising in contract, with certain exceptions, where the sum demanded is not above \$100; and by the 26th section, it is provided that any person who shall bring suit in court, for a debt or demand made cognisable by the justices, is debarred from costs, unless before the issuing of the original writ he files, in the office of the prothonotary, his oath or affirmation, that he verily believes "the debt due or damages sustained exceed the sum of \$100."

It is now settled, that where the amount recovered by the plaintiff in an action commenced in the Common Pleas, is reduced to a sum below one hundred dollars, by a set-off or cross-demand, the plaintiff is entitled to costs without filing an affidavit, as required by the Act of 1810,<sup>2</sup> and this whether the set-off or cross-demand is of a liquidated or of an uncertain nature, although there appears, at first, to have been some doubt, where the set-off was of a certain nature and capable of calculation, whether the plaintiff was not bound to elect the proper tribunal at his peril, where due precaution would enable him to proceed with safety.<sup>3</sup> But in *Grant v. Wallace*,<sup>4</sup> the Supreme Court determined otherwise, Gibson, C. J., dissenting for that reason.<sup>5</sup> And this ruling has been followed in a later case, where, in a suit brought in the Common Pleas on a promissory note, in which the plaintiff recovered less than one hundred dollars, he was held to be entitled to costs, the note sued on being for more than one hundred dollars, and the claim having been reduced by an agreement that the price of a horse, and the amount of certain joint and separate claims of the defendants, which had been settled, should go off the note, which was proved on the trial.

Where a defendant in a case before a justice of the peace offers a judgment for a certain sum with costs, the law implies that he offers it, with interest; and if, on appeal, the plaintiff finally recovers less than the amount of the offer with interest, he must pay the costs accruing subsequent to the appeal.<sup>6</sup>

As a justice of the peace has no jurisdiction in account render, a plaintiff suing his co-tenant in account render in the Common Pleas, and recovering a verdict under one hundred dollars, is entitled to costs.<sup>7</sup>

<sup>1</sup> 5 Sm. Laws 161; Dunlop Dig., ed. 1849, 280.

<sup>2</sup> *Brailley v. Miller*, 2 Dallas 74; *Sadler v. Slobaugh*, 3 S. & R. 388; *Grant v. Wallace*, 16 S. & R. 253; *Spear v. Jamieson*, 2 S. & R. 531; *Bartram v. M'Kee*, 1 Watts 39; *Manning v. Eaton*, 7 Watts 346.

<sup>3</sup> *Sadler v. Slobaugh*, 3 S. & R. 388.

<sup>4</sup> 16 S. & R. 253.

<sup>5</sup> It would appear from the opinion of the C. J. that the set-off was of an ascertained amount, although the report of the case does not mention its nature.

<sup>6</sup> *Park v. Sweeny*, 3 Wright 111.

<sup>7</sup> *Steffen v. Hartzell*, 5 Whart. 448.

Where the plaintiff splits up into several suits before a justice an aggregate claim exceeding one hundred dollars, for which one suit might have been brought in court, the costs of one suit only can be recovered by him against the defendant.<sup>1</sup>

But it is to be noticed that there is a distinction to be drawn between the cases where the claim is reduced below one hundred dollars by a set-off and by a direct payment, as in the latter case the plaintiff will not be entitled to costs without filing a previous affidavit. This distinction, which was laid down in *Cooper v. Coates*,<sup>2</sup> a case which arose under an earlier act, limiting the jurisdiction of a justice of the peace to ten pounds, has been recognised and followed in cases which have arisen under the Act of 1810.<sup>3</sup>

It is to be observed also that the 26th section is binding on arbitrators and juries as well as the court, and that they cannot by their finding compel the defendant to pay costs where the plaintiff under this act is not entitled to them;<sup>4</sup> and although the arbitrators award that each party shall pay his own costs, yet if the sum awarded carry costs, or if it has been reduced below \$100 by a set-off, the plaintiff is entitled to costs.<sup>5</sup> Where the sum recovered is less than \$100, and the case is not within the jurisdiction of a justice of the peace, the plaintiff is, of course, entitled to costs without having previously filed an affidavit.<sup>6</sup>

Under the Act of March 22d 1814, § 1,<sup>7</sup> the jurisdiction of justices of the peace of the several counties of the commonwealth and aldermen of the city of Philadelphia was extended to actions of trover and conversion and actions of trespass for injury done or committed on real or personal estate, where the value of the property claimed or the damages alleged to have been sustained, do not exceed \$100.<sup>8</sup>

The 6th section provides, "That the said justices of the peace and aldermen shall have original jurisdiction of all cases of rent not exceeding \$100, to be recovered as debts of similar amount are recoverable."<sup>9</sup>

It has been held that the first section of this act does not deprive the Court of Common Pleas of jurisdiction; and, as there is no provision depriving a plaintiff of his costs, he will be entitled to full costs in actions of trespass and trover brought in the Common Pleas, although the amount of the claim and verdict recovered may be less than \$100.<sup>10</sup>

And by the Act of the 13th of February 1816,<sup>11</sup> it is provided

<sup>1</sup> *Towanda Bank v. Ballard*, 7 W. & S. 434.

<sup>2</sup> 1 Dallas 308.

<sup>3</sup> *Stewart v. Mitchell*, 13 S. & R. 287; *Odell v. Culbert*, 9 W. & S. 66; and in *Barry v. Mervine*, 4 Barr 330.

<sup>4</sup> *Heath v. Atkinson*, 1 Browne 231; *Ghier v. Macfaddon*, 1 Ash. 1; *Sneively v. Weidman*, 1 S. & R. 417; *Lewis v. England*, 4 Binn. 5.

<sup>5</sup> *Spear v. Jamieson*, 2 S. & R. 530.

<sup>6</sup> *Zell v. Arnold*, 2 Pa. R. 292; *Com-*

*monwealth v. Reynolds*, 17 S. & R. 369; *Shaw v. Levy*, *Ibid.* 102.

<sup>7</sup> 6 Sm. Laws 182; *Dunlop Dig.*, ed. of 1849, 305; *Purd. Dig.* 604.

<sup>8</sup> *Lauchner v. Rex*, 8 Harris 464; *Williams v. Smith*, 4 P. L. J. 351; *Jacobs v. Hancy*, 6 Harris 240.

<sup>9</sup> *Purd. Dig.* 693.

<sup>10</sup> *Hinds v. Knox*, 4 S. & R. 417; *Clarke v. McKisson*, 6 S. & R. 87; *Richards v. Gage*, 1 Ash. 192.

<sup>11</sup> 6 Sm. Laws 323.

that in all actions for the recovery of damages, for any trespass committed against real or personal estate, before any justice or alderman, and referred agreeably to law, the referees shall be empowered, in addition to their report of the damages, to decide and report whether the plaintiff or defendant should pay the costs of such action, or in what proportion they should be paid by the plaintiff or defendant respectively.<sup>1</sup>

The 6th section of the Act of 1814, before quoted, conferring jurisdiction on aldermen and justices of the peace in cases of rent, provides for their recovery "as debts of a similar nature are recoverable." There has been no decision as yet in the Supreme Court which determines whether, under the phraseology of this section, the provisions of the 26th section of the Act of 1810, taking away the plaintiff's right to costs where suit is brought in the Common Pleas, are to be considered as applying to cases of rent; in a case, however, in the Court of Common Pleas of Philadelphia, in an action brought to recover arrears of ground-rent, the question being as to the plaintiff's right to costs, it was held by Thompson, P. J., that "if the plaintiff chooses to proceed under the Act of April 8th 1840, in order to obtain judgment on two *nihilis* in the Court of Common Pleas, he must pay his own costs. The Act of April 8th 1840, does not restrict the jurisdiction of the justice, nor extend that of the court. The judgment, therefore, does not carry the costs."<sup>2</sup> But it is now otherwise by legislation.

Where the plaintiff in *assumpsit* recovered less than \$100, and there was nothing to show that the demand was reduced by *set-off*, judgment was properly entered without costs.<sup>3</sup> Whether a party to the distribution of money in court may be allowed costs for witnesses, *subpoenas*, &c., is a matter for the discretion of the court under the circumstances; as against an undisputed lien no such costs will be allowed; but as against a contesting claim, the successful party is entitled to costs out of that part of the fund contended for.<sup>4</sup>

As the District Court for the City and County of Philadelphia has no jurisdiction, except where the amount in controversy exceeds one hundred dollars,<sup>5</sup> a plaintiff is never aided in the recovery of costs in the District Court by the previous filing of an affidavit; the rule being, that that court has no jurisdiction whatever, where the plaintiff could not recover costs, if he had sued in the Common Pleas, unless he filed a previous affidavit, before the erection of the District Court.<sup>6</sup>

In regard to the jurisdiction of the District Court,<sup>7</sup> it is only necessary here to remark that, where the plaintiff's demand is reduced by a *set-off* below one hundred dollars, the District Court

<sup>1</sup> See *Wilkinson v. Grey*, 14 S. & R. 346.

<sup>2</sup> C. P. C. C. P. July 10th 1852; 9 Leg. Int. 114; *Janney v. Funston*, 1 Phila. R. 373; *Purd. Dig.* 516; *Pamph. L.* 249. The Act of April 8th 1857, *Pamph. L.* 175, provides that costs may be recovered as in other cases.

<sup>3</sup> *Hale's Executors v. Ard's Executors*, 12 Wright 22.

<sup>4</sup> *Appeal of the Borough of Easton*, 11 Wright 255.

<sup>5</sup> Act of March 30th 1811; 5 Sm. Laws 223.

<sup>6</sup> *Kline v. Wood*, 9 S. & R. 300.

<sup>7</sup> See *ante* 16.

has jurisdiction wherever the plaintiff would be entitled to costs in a similar case brought in the Common Pleas, without having made a previous affidavit of his belief that his claim exceeded that amount; and, in case of *tort*, the jurisdiction is determined by the amount demanded in the declaration.<sup>1</sup>

By the Act of 29th March 1810,<sup>2</sup> the original jurisdiction of the Supreme Court, in the city and county of Philadelphia, was restored in all civil actions wherein the matter in controversy is of the value of five hundred dollars and upwards; but there is no restriction as to costs. It follows, therefore, that in all cases where the court has jurisdiction, costs are of course. The Act of September 1786<sup>3</sup> discouraged suits for small matters, by refusing costs where not more than fifty pounds were recovered. The Act of March 1810 did the same thing in a different but more effectual way; that is to say, by denying any jurisdiction in cases where *the value of the matter in controversy* was not at least five hundred dollars.<sup>4</sup> The Act of September 1786, § 5,<sup>5</sup> which first extended original jurisdiction to the Supreme Court in Philadelphia county, provided, that if any party should bring any suit therein and not recover more than fifty pounds, he should be allowed no costs of suit. A jury might, however, in addition to a penalty of fifty pounds, have given nominal damages in an action of debt by the party aggrieved, and in such case the plaintiff was entitled to full costs under the Act of Assembly.<sup>6</sup>

All disputes arising out of a policy and joined in the same action, are, therefore, considered the *matter in controversy*; and if the plaintiff, to a demand for a total loss exceeding five hundred dollars, join a count for money had and received, to recover back the premium, though the amount of such premium demanded be less than five hundred dollars, he is entitled to costs if he recover only on the count for money had and received.<sup>7</sup> So, where in trespass the case was arbitrated before declaration filed, and the award was two hundred and fifty dollars, and it was proved that the plaintiff's demand before the arbitrators exceeded five hundred dollars, it was held that he was entitled to costs.<sup>8</sup> In *tort*, the plaintiff having a right to estimate his damages at any sum, the amount stated in the declaration is the only criterion to be resorted to in settling the jurisdiction. If, therefore, the damages are laid at five hundred dollars, the plaintiff gets costs although he recovers a smaller sum.<sup>9</sup> In the case of an ejectment, the court would be obliged to receive affidavits as to the value of the controversy; but in most cases it may be ascertained from the nature of the dispute and evidence in the cause.<sup>10</sup> All original jurisdiction being now taken from the Supreme Court, except as above stated, and continued by the Act of 1836, as we have before seen, the decisions above quoted are useful so far only

<sup>1</sup> Rodman v. Hutchinson, 4 Whart. 242; Byrne v. Gordon, 2 Browne 271.

<sup>2</sup> 5 Sm. Laws 158.

<sup>3</sup> 2 Sm. Laws 392.

<sup>4</sup> Per TILGHMAN, C. J.; Wurts v. McFaddon, 4 S. & R. 79

<sup>5</sup> 2 Sm. Laws 392.

<sup>6</sup> Norris v. Pilmore, 1 Yeates 405.

<sup>7</sup> Wurts v. McFaddon, 4 S. & R. 78.

<sup>8</sup> Bazire v. Barry, 3 Ibid. 461.

<sup>9</sup> Ibid.; Hancock v. Barton, 1 S. & R.

269; McKisson v. Steel, 1 Yeates 1.

<sup>10</sup> Per curiam. Byrne v. Gordon, 2 Browne 274.

as they are connected with similar questions in the courts possessing such jurisdiction.

## SECTION II.

## DEFENDANT'S COSTS.

1. *Of the defendant's costs generally.*

By the statute 4 Jac. 1, c. 13,<sup>1</sup> it is provided that, in all cases in which a plaintiff would be entitled to costs if he recovered, the defendant shall recover his costs if a verdict be found for him, or the plaintiff be nonsuit.

In the Statute of Gloucester, no provision was made for the costs of a defendant in any case; nor was any made, except in actions of replevin and writs of error, until the 23 H. VIII. c. 15,<sup>2</sup> which particularizes the actions wherein a defendant shall recover costs: but the statute 4 Jac. I. c. 13, reciting that the 23 H. VIII. c. 15 had been found a very beneficial law, extended the provisions of that statute to every action in which a plaintiff or demandant may recover costs.

By statute 18 Eliz. c. 5, in actions upon penal statutes by common informers, the defendant is entitled to his costs if he have a verdict, though the plaintiff would not be entitled even if he succeeded.<sup>3</sup>

The right of the defendant to costs where the plaintiff "shall not prosecute his suit with effect, but shall willingly suffer his suit to be delayed, or shall suffer the same to be discontinued, or be otherwise nonsuited therein," was given by the statute 8 Eliz. c. 2.<sup>4</sup>

A discontinuance is founded always upon the express or implied leave of the court;<sup>5</sup> and a plaintiff cannot discontinue his suit except upon payment of costs; and until the payment of costs, there is no discontinuance;<sup>6</sup> and the entry of a *nol. pros.* is a discontinuance within the statute.<sup>7</sup>

Where the judgment is arrested after verdict, each party pays his own costs.<sup>8</sup>

Where judgment is entered for the defendant on demurrer, he is entitled to costs by the statute 8 and 9 Will. III. c. 11; but the statute does not extend to the case where judgment is given for the defendant on a demurrer to a plea in abatement, because the statute speaks of suits which are vexatious, which does not appear to the court on pleas in abatement, but only on demurrers in bar.<sup>9</sup>

The plaintiff in replevin is entitled to costs by the Statute of Gloucester; the defendant, or avowant, by statute 7 H. VIII. c. 4, which is declared in force, excepting those parts which relate to writs of *quare impedit* and advowsons.<sup>10</sup> By our Act of Assembly

<sup>1</sup> Rob. Dig. 129.

<sup>2</sup> Ibid.

<sup>3</sup> 1 Salk. 30; Cowper 366; 2 Strange 1103; Hullock 214, 220.

<sup>4</sup> Rob. Dig. 125.

<sup>5</sup> *Schuykill Bank v. Macalester*, 6 W. & S. 147.

<sup>6</sup> Arch. Prac. 1058.

<sup>7</sup> 3 T. R. 511.

<sup>8</sup> Cowp. 407; Gilbert, C. P. 272.

<sup>9</sup> 1 Salk. 194; s. c., 1 Ld. Raym. 336; 6 Mod. 88; 12 Ibid. 195.

<sup>10</sup> Rob. Dig. 117; and see 4 J. I. c. 3, Ibid. 129.

the defendant in replevin may avow for rent in arrear, and make cognisance generally, and if the plaintiff becomes nonsuit, discontinues his action, or has judgment given against him, the defendant, in such replevin, shall recover double costs of suit.<sup>1</sup> If the plaintiff be *non-prossed*, the defendant shall have his costs as in other cases.<sup>2</sup> If there be two defendants in replevin, one of whom is acquitted, he is not entitled to costs;<sup>3</sup> for replevin is not within the statute 8 and 9 William III. c. 11.<sup>4</sup>

Replevin sureties by plaintiff to prosecute his suit with effect, are liable for costs to defendant, if plaintiff fails.<sup>5</sup>

Where the defendant in replevin avowed for rent in arrear, and there was an award of arbitrators in favor of avowant, the plaintiff is not compelled to pay double costs in order to obtain an appeal.<sup>6</sup>

The Act of 3d April 1779,<sup>7</sup> after providing that all writs of replevin granted or issued for any owner or owners of any goods or chattels levied, seized, or taken in execution, or by distress or otherwise, by any sheriff, naval officer, lieutenant, or sub-lieutenant of the city of Philadelphia or of any county, constable, collector of the public taxes, or other officer, acting in their several offices under the authority of the State, are irregular, erroneous, and void—directs, that such writs may be quashed by the court to which they are made returnable, on motion, supported by affidavit; and the court *may and shall*, upon quashing the writ, award treble costs to the defendant. This act, however, does not apply to a writ of replevin brought by the owner of goods taken in execution against the sheriff's vendee;<sup>8</sup> nor to a writ issued against the defendant in the execution, by a third person, for goods which had been taken in execution for the debt of defendant.<sup>9</sup>

In actions of *scire facias*, the defendant is entitled to costs, by virtue of the 8 & 9 William III. c. 11,<sup>10</sup> which provides, that "if the plaintiff become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover costs."

The costs of a *scire facias* on a mechanic's lien are to be paid out of the fund raised by the sale of the building upon which the lien attached;<sup>11</sup> and where, during the pendency of a *scire facias*, the property was sold under an older lien, and the proceeds were absorbed by older lien-creditors, the court will not aid either party in the recovery of costs, by permitting them to go on to trial.<sup>12</sup>

The defendant is not liable, personally, for costs on a *scire facias* on a mortgage, the judgment being exclusively *de terris*; nor does a tenant, applying by petition and permitted to defend, incur any personal liability for costs, unless there be a stipulation to that

<sup>1</sup> Act of March 1772, 1 Sm. Laws 372; see *post*, "Double and Treble Costs," 763.

<sup>2</sup> See 1 T. R. 372.

<sup>3</sup> 1 W. Bl. 355; 3 Burr. 1284.

<sup>4</sup> Rob. Dig. 139.

<sup>5</sup> Tibbal v. Cahoon, 10 Watts 236.

<sup>6</sup> Hartley v. Bean, 1 Miles 168.

<sup>7</sup> 1 Sm. Laws 470; Dunlop Dig., ed.

1849, 122.

<sup>8</sup> Shearick v. Huber, 6 Binn. 2.

<sup>9</sup> English v. Dalbrow, 1 Miles 160; Mulholm v. Cheney, Add. 301.

<sup>10</sup> Rob. Dig. 140; Haskins v. Low, 5 Harris 64.

<sup>11</sup> M'Laughlin v. Smith, 2 Wh. 122.

<sup>12</sup> Matlack v. Deal, 1 Miles 254.

effect when his petition was granted;<sup>1</sup> nor in a *scire facias* on a mechanic's lien is a contractor personally liable for costs.<sup>2</sup>

By the Defalcation Act of 1705,<sup>3</sup> if the jury find that the plaintiff is overpaid, they shall give their verdict for the defendant, and certify how much they find the plaintiff indebted to him over and above the sum demanded, which sum shall be recorded with the verdict, and he deemed as a debt of record; and if the plaintiff refuse to pay the same, the defendant, for recovery thereof, shall have a *scire facias* against the plaintiff, and have execution for the same with the costs of that action. If, in the interim, the defendant have instituted a cross-action, the plaintiff will be burdened with the costs of both suits—with those of the first, for having brought a vexatious action, and with those of the second, because the defendant shows a good cause of action. To suppose that, by virtue of this act, a man who is really a creditor shall not bring an action, because his debtor has already sued him, is pregnant with absurdity.<sup>4</sup>

The District Court has refused to allow costs to a defendant for his answer to a bill of discovery.<sup>5</sup>

With regard to the garnishee's right to costs in a *scire facias* in foreign attachment, if the plaintiff does not prove more in the hands of the garnishee than he admits by his plea, or his answers upon interrogatories, the plaintiff must pay costs; but if more is proved, then the costs shall be paid by the garnishee.<sup>6</sup>

If a garnishee suffers judgment to go against himself, he is not liable for costs, because he has done nothing but pursue the path pointed out by law; but if he pleads a false plea, if he falsely denies that he has any effects in his hands, or there are effects exceeding those he admits, he is responsible for costs.<sup>7</sup> And a garnishee who has filed his answers to the interrogatories of the plaintiff, is entitled to recover his costs, if the plaintiff compels him to plead and prepare for trial, and then becomes nonsuit.<sup>8</sup>

It seems plain, from the tenor of the acts regulating attachment-executions, that the proceedings should be governed by the familiar rules in foreign attachments, when not otherwise directed. Hence, the subject of costs to plaintiff and to garnishee are regulated by the old foreign attachment law; and a garnishee who answers interrogatories is entitled to costs, if the plaintiff proceeds to trial, and becomes nonsuit.<sup>9</sup>

Where an attachment sur judgment was issued in each of three several cases, and several individuals and three corporations made garnishees, and an issue was joined with one of the corporations in each of the cases which were severally tried, and verdict and judgment entered for the garnishee, the prothonotary allowed the usual

<sup>1</sup> Wickersham v. Fetrow, 5 Barr 260.

<sup>2</sup> Dickinson College v. Church, 1 W. & S. 465.

<sup>3</sup> 1 Sm. Laws 49; Dunlop Dig., ed. 1849, 45.

<sup>4</sup> Beache v. Bryan, and Bryan v. Beache, C. P. Sept. Term, 1767, MS. Reports.

<sup>5</sup> Tenor v. Hutton, D. C. C. P., 7 Leg. Int. 50.

<sup>6</sup> Walker v. Dallas, 2 Dallas 113.

<sup>7</sup> Wood v. Ludwig, 5 S. & R. 446; Myers v. Urick, 1 Binn. 25.

<sup>8</sup> Hall v. Knapp, 1 Barr 213.

<sup>9</sup> Ibid.



bill of costs as upon a suit in court, and on appeal the District Court affirmed the taxation.<sup>1</sup>

It is provided by the Act of 1705, § 2,<sup>2</sup> that the garnishees shall be allowed, out of the effects attached, reasonable satisfaction for his attendance; this has always been held to include the expenses of counsel fee;<sup>3</sup> and where a foreign attachment is laid for a smaller sum than is in the hands of the garnishee, he is not justified in withholding from his creditor more than sufficient to cover the debt claimed by the plaintiff in the attachment, the interest which would probably accumulate, costs, and a liberal allowance for expenses;<sup>4</sup> but the garnishee is not entitled to retain, as against the plaintiffs, the costs and expenses of subsequent writs of foreign attachment issued against the same defendants.<sup>5</sup>

Where the plaintiff and garnishee join issue as to the amount in the hands of the latter, the proceedings become adversary between them and the costs are to be paid by the garnishee, if the result should find more in his hands than he admitted on the record, otherwise by the plaintiff.<sup>6</sup> Where the garnishee admitted in his answer a certain amount due to the defendant, claiming to be allowed his expenses in the case out of the same, and the plaintiff ruled him to plead and he pleaded *nulla bona*, and the verdict found the same amount due as admitted in the answer, the plaintiff was liable for the costs of the issue.<sup>7</sup> In an action of partition, where a verdict and judgment are rendered for the defendants on the plea of *non tenent insimul*, they cannot recover their costs from the plaintiff.<sup>8</sup>

In a *sci. fa.* in foreign attachment, the garnishees were held not to be entitled, upon judgment rendered for them, to the costs of an exemplification of an assignment which was produced by them on trial to prove their case.<sup>9</sup>

When there are several defendants who succeed in the action, the plaintiff may pay costs to which of them he pleases;<sup>10</sup> and if they fail, each of them is answerable for the whole costs.<sup>11</sup>

2. *Where there are several defendants, and one or more are acquitted by verdict.*

In trespass, assault, false imprisonment, or ejectment, if there be several defendants, and one of them is acquitted, he shall recover

<sup>1</sup> *Magruder v. Adams*, D. C. C. P., Feb. 2d 1850. *Per curiam*. The 35th section of the Act of June 16th 1836, relating to execution, provides that an attachment may issue in the case of a debt due the defendant; "but in such case a clause, in the nature of a *scire facias* against a garnishee in a foreign attachment, shall be inserted in such writ of attachment." It is clear, then, that the attachment occupies, in respect to the garnishee, the same place that a separate *scire facias* does against a garnishee in a foreign attachment, and it is not to be doubted that such a *scire facias* is a suit, costs in which are recoverable as in the case of a suit com-

menced by original process. The question has been likened to a *scire facias* on a judgment against several *terre-tenants*, but there is no analogy. Appeal dismissed.

<sup>2</sup> 1 Sm. 46.

<sup>3</sup> See Act of April 22d 1863, Pamph. L. 527.

<sup>4</sup> *Sickman v. Lapsley*, 13 S. & R. 224.

<sup>5</sup> *Warner v. Bancroft*, 2 Miles 95.

<sup>6</sup> *Newlin v. Scott*, 2 Casey 102.

<sup>7</sup> *Ibid*.

<sup>8</sup> *Shaw v. Irwin*, 1 Casey 347.

<sup>9</sup> *Christmas v. Biddle*, D. C. C. P., 7 Leg. Int. 66; see 1 Harris 223.

<sup>10</sup> Str. 516, 1203.

<sup>11</sup> Bull. N. P. 335.

his costs in the like manner as if a verdict had been given against plaintiff, unless the judge shall immediately after the trial, in open court, certify upon the record that there was a reasonable cause for making such person a defendant.<sup>1</sup>

When one of several defendants lets judgment go by default, and the other pleads a plea, which goes to the whole declaration, and shows that the plaintiff had no cause of action, if this plea be found for the defendant who pleaded it, he shall have costs; and being an absolute bar, the other defendant shall have the benefit of it, and shall not pay costs to the plaintiff.<sup>2</sup> But when the plea goes merely to discharge the party pleading it, then the other party shall pay costs, though it be found against the plaintiff.<sup>3</sup>

The statute does not, however, extend to replevin;<sup>4</sup> or to trespass on the case for a tort,<sup>5</sup> or trover;<sup>6</sup> and in all cases not within this statute, if the plaintiff proceed to trial against several defendants, and obtain a verdict against any one of them, the others will not be entitled to costs. But if some only of several defendants proceed to trial, the others having suffered judgment by default, and those who proceed to trial obtain a verdict, the defendants who obtain a verdict in such a case are entitled to their costs under the statute of 4 Jac. I. c. 3, although the plaintiff have his judgment and costs against the others who suffered judgment by default.<sup>7</sup>

The statute of 8 & 9 William III. c. 11, does not extend to an action of *scire facias*. Thus, in a *scire facias* to revive a judgment against an administrator, with notice to several *terre-tenants*, a several issue was joined with each *terre-tenant*, and a verdict and judgment rendered against one tenant, and in favor of the others. It was held that the defendants in whose favor the verdict and judgment were given, were not entitled to recover their costs from the plaintiff.<sup>8</sup> But where there are several garnishees to a *scire facias* in proceeding in the nature of foreign attachment, it would seem that those obtaining judgment would be entitled to costs.<sup>9</sup>

### 3. In the case of an equitable plaintiff.

The Act of April 23d 1829,<sup>10</sup> proves that "the equitable plaintiff, or person for whose use or benefit, and at whose instance any action has been, or may be presented, whether named on the record or not, shall be liable to execution on judgment against the legal plaintiff or plaintiffs: *Provided*, That where such equitable plaintiff or plaintiffs were not named on the record previous to judgment, his name shall be suggested on the record, supported by affidavit of his interest in the cause, before execution shall issue."

By the Act of April 6th 1858,<sup>11</sup> it is provided "that in all equity proceedings in the District Court of Philadelphia, costs shall be allowed as provided in the Supreme Court."

<sup>1</sup> 8 & 9 W. III. c. 11; Rob. Dig. 139.

<sup>2</sup> 1 Lev. 63; 8 Mod. 217; 2 H. Bl. 28.

<sup>3</sup> Cro. Jac. 134, ca. 7; 3 T. R. 656.

<sup>4</sup> 3 Burr. 1284.

<sup>5</sup> 2 Str. 1005; 6 Bing. 530.

<sup>6</sup> Barnes 139.

<sup>7</sup> 2 H. Bl. 28; see 6 Taunt. 398.

<sup>8</sup> Maus v. Maus, 10 Watts 87.

<sup>9</sup> See Magruder v. Adams, *ante*, 737 note.

<sup>10</sup> Pamph. L. 335; Dunlop's Dig., ed. 1849; Purd. Dig. 399.

<sup>11</sup> Purd. Dig. 404, § 28, Pamph. L. 210.

Where a suit has been carried on for the use of an assignee, the nominal plaintiff being insolvent, the court will permit the defendant, after verdict, to suggest upon the docket that the suit was for the use of the assignee, and will rule him to pay the costs.<sup>1</sup> So, in an action by the assignee of a bond irregularly assigned, brought in the name of the obligee for the former's use, the court will compel the assignee to pay the costs.<sup>2</sup> And where the assignee brings an action in the name of the assignor, without consulting or informing him of it (which is the experience of every day), the assignor is considered as out of the question, and the court would issue an attachment for costs against the person for whose use the suit is brought, in case of a judgment for the defendant.<sup>3</sup> Any person who, at the commencement of suit, is entitled to a portion of the money claimed, is liable for costs.<sup>4</sup> It is immaterial whether his name be on the record or not.<sup>5</sup>

The person for whose use an action has been brought, is liable in *assumpsit*, upon an express promise to pay to the defendant, in such action, the amount of costs incurred.<sup>6</sup>

He who procures the suit to be brought, though neither the legal nor equitable plaintiff, is liable for the costs, if there be no other from whom they can be recovered.<sup>7</sup>

In actions on official bonds, sued in the name of the commonwealth, for the use of parties aggrieved, or in action brought by an assignee of the State, the court will look to the real party on the record, and compel him to pay costs.<sup>8</sup>

The rule in Pennsylvania seems now to be settled, that the expenses of a contest in regard to the establishment of a will, must be borne by those having a direct interest in the result; not by those who claim the estate in opposition to the alleged testament.<sup>9</sup>

Where the Supreme Court reverses a judgment on an issue *deviavit vel non*, and enters judgment for the other party with costs, this includes the costs in the Common Pleas and on error, but not costs arising before the Register.<sup>10</sup>

The sheriff made a special return in favor of the lien of a purchaser at his sale, in pursuance of the Act of 20th April 1846, and exceptions to it were taken by a creditor, which on reference to an auditor were ascertained to be unfounded: *Held*, That the party excepting ought to pay *the costs of the audit*, unless he satisfied the court that he had probable cause to object to the return.<sup>11</sup>

<sup>1</sup> Canby v. Ridgway, 1 Binn. 496; Hoak v. Hoak, 5 Watts 80.

<sup>2</sup> Commonwealth v. County Commissioners, 8 S. & R. 154.

<sup>3</sup> Steele v. Phoenix Ins. Co., 3 Binn. 312; see Gallagher v. Milligan, 3 Pa. R. 177; Brewer v. Hayes, 2 Watts 12; Tomb's Appeal, 9 Barr 66.

<sup>4</sup> Gallagher v. Milligan, 3 Pa. R. 178.

<sup>5</sup> Ibid.

<sup>6</sup> Brewer v. Hayes, 2 Watts 12.

<sup>7</sup> Huxton, J., Utt v. Long, 6 W. & S. 178, and note 3. *supra*. Lyon v. Allison, 1 Watts 162; Presbyterian Con-

gregation v. Carlisle Bank, 5 Barr 351; Wistar v. Walker, 2 Browne 171; Orphans' Court v. Woodburn, 7 W. & S. 165; Hamilton v. Brown, 6 Harris 89; Commonwealth v. Shuman's Adm'rs., Ibid. 346; Miller's Executor v. Lint, 12 Casey 448. In the last case the practice here pointed out has been approved by C. J. Lowrie.

<sup>8</sup> Commonwealth v. County Commissioners, 8 S. & R. 153.

<sup>9</sup> Landis's Estate, 1 Phil. R. 528.

<sup>10</sup> McMasters v. Blair, 7 Casey 467.

<sup>11</sup> Larimer's Appeal, 10 Harris 41.

The Court of Common Pleas, where there is no certificate, as provided by the Act of 1836, that there was not *probable cause* for the application, may direct the payment of the costs by the lunatic *before the proceeding is determined*; such order, however, being but interlocutory, will not prevent the court from directing reimbursement, or making a different decree on the determination of the case.<sup>1</sup> In England the general rule is to allow the costs of a commission of *lunacy* out of the estate of the lunatic, if the lunacy be established.<sup>2</sup> But if the party be found not to be a lunatic, or if the commission be superseded before any part of the property vest in the crown, no costs will be allowed to the party taking it out. This result is for *want of jurisdiction*.<sup>3</sup> But in Pennsylvania, under the constitutional provision giving the Supreme Court and Common Pleas the power of a court of chancery in relation to the persons and estates of those who are *non compos mentis*; and under the Acts of 13th June 1836 and of 16th April 1849, in relation to commissions of lunacy; the court have control over the costs of such proceeding; and may decide who shall pay them, or may apportion their payment among the parties interested.<sup>4</sup>

The authority to tax costs according to the exigency of each case, or to a general rule, has always been an element of chancery jurisdiction, and is not withheld from our courts in chancery cases.<sup>5</sup> Until the court establish a fee-bill in chancery cases, costs are necessarily a matter of discretion, and are to be taxed with the aid of the analogies of our costs at common law.<sup>6</sup>

#### 4. *Security for costs.*

So necessary an appendage or incident to the judgment have costs now become, that the defendant may (under some circumstances) at an early period of the suit, call on the plaintiff to furnish security for the costs, or else to submit, in our practice, to a judgment of nonsuit or *non pros.*; which security extends not only to costs already incurred, but also to prospective costs of the suit;<sup>7</sup> and, therefore, the recognisance or obligation entered into by the plaintiff and his sureties, should be devised so as to bind them to the payment of costs in case the plaintiff should not prosecute his suit with effect.<sup>8</sup> By a rule of the District Court of the City and County of Philadelphia, it is ordered, "That in cases where the plaintiff resides out of the State, in *qui tam* actions, in suits on administration or office bonds, or when the plaintiff, after suit brought, has taken the benefit of the insolvent laws, the defendant, on motion and affidavit of a just defence against the whole demand, may have a rule that the plaintiff give security for costs at or before some period to be appointed by the court; and, for want of such security, the court, on motion, may order judgment of nonsuit to be entered."<sup>9</sup> The rule in the Supreme Court and Philadelphia Common Pleas is identical.<sup>10</sup>

<sup>1</sup> Clark's Case, Ibid. 467.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Neel v. Neel, 1 Grant's Cases 171.

<sup>6</sup> Ibid.

<sup>7</sup> 1 Barn. & Ald. 331.

<sup>8</sup> See Browne v. Arbuckle, Peters's C. C. R. 233; Ayres v. Sweigart, 6 Watts 191.

<sup>9</sup> Rule LXXVII., Walker's Rules 28.

<sup>10</sup> Rule XIV., sect. 1, Walker's Rules 50, 106.

Under this rule of court, the practice in the District Court is, that a rule on the plaintiff to give security for costs will not be granted, unless he is a non-resident of the State at the institution of the suit; and the affidavit of the party applying for such rule is defective unless it states such non-residence at the time of the institution of the suit.<sup>1</sup>

But, in the Supreme Court of Pennsylvania for the Eastern District, and the Court of Common Pleas of the county of Philadelphia, where similar rules prevail, the construction is different, and it is held that the rule requiring security for costs, applies as well to cases where the plaintiff has removed from the State *pendente lite*, as where he was a non-resident at the commencement of the suit. But application for the security must be made at the earliest possible time after the fact has come to his knowledge. The court will not order it to be given where there has been an award by arbitrators in favor of the plaintiff, from which the defendant has not appealed.<sup>2</sup>

Security for costs will not be required where one of the plaintiffs resides within the State, although the others may reside out of it.<sup>3</sup> But where there are two plaintiffs, one of whom resides out of, and the other within the State, and the plaintiff within the State dies pending the suit, the defendant may have a rule for security for costs.<sup>4</sup>

Plaintiffs who live out of the jurisdiction of the court, may be compelled to give security for costs, although they sue in a representative character.<sup>5</sup>

It is no objection to the motion, that the defendant himself resides out of the State; and he will not be compelled to give security himself, in order to entitle him to it from the plaintiff,<sup>6</sup> except a defendant in replevin, residing out of the jurisdiction of the court, who cannot, it is said, be distinguished from any ordinary plaintiff, as to giving security for costs.<sup>7</sup>

In the practice of the English courts, it would be too late, after notice of trial given, to make this motion, if the defendant had an opportunity of making an earlier application.<sup>8</sup> But, in this State, it is never too late to grant a rule for security for costs, when it will not delay the trial.<sup>9</sup>

If not demanded in a reasonable time, the applicant cannot object to a trial because it has not been given;<sup>10</sup> and it is too late after an award of arbitrators, and an appeal by the defendant, for him to require security for costs.<sup>11</sup>

It cannot, however, be made in bailable actions, until after bail has been put in, and justified,<sup>12</sup> unless the defendant be in custody.<sup>13</sup>

<sup>1</sup> Searle v. Mann, 1 Miles 321; Frost v. Earnest, D. C. C. P., Feb. 1836, MS.

<sup>2</sup> McGarry v. Crispin, 4 P. L. J. 353; Sharp v. Buffington, 2 W. & S. 454.

<sup>3</sup> Zimmerman v. Mendenhall, 2 Miles 402; 1 East 431; 7 Taunt. 307.

<sup>4</sup> 2 Johns. Cas. 67.

<sup>5</sup> 1 Brod. & Bing. 277; 3 Moore 602; 1 Dowl. 366.

<sup>6</sup> 6 Taunt. 379.

<sup>7</sup> 1 Brod. & Bing. 505.

<sup>8</sup> Arch. Pr. 1017.

<sup>9</sup> Shaw v. Wallace, 2 Dallas 179; Ibid., 1 Yeates 176.

<sup>10</sup> Hawkins v. Willbank, 4 Wash. C. R. 285.

<sup>11</sup> Cantelo v. Binns, 2 Miles 86.

<sup>12</sup> Arch. Pr. 1017.

<sup>13</sup> Ibid.

The rule of court above quoted, as far as regards insolvents, is applicable only to cases in which the beneficial interest in the action has passed to the assignee. It cannot, therefore, be extended to a case in which damages are claimed for a personal *tort*. Neither would it be a valid rule if it did expressly embrace such a case.<sup>1</sup>

As the case of infancy depends upon the common law, and not upon any written order of the English courts, it may, notwithstanding that the rule of the District Court does not include it, still be law in that court.

5. *Of the costs in former actions.*

The practice of the courts to stay proceedings in a second action, where the plaintiff has failed in a former action against the same defendant, for the same cause, until the costs of the former action are paid, originated in the action of ejectment, and afterwards the practice was extended to other forms of action, but in all cases as well in ejectment as others, *the vexation of the party* is the ground on which the court interposes in this way.<sup>2</sup> When the merits of the cause have been heard, and the plaintiff is either nonsuited or a verdict passes against him, the plaintiff will not be permitted to harass the defendant with a second suit on the same ground, until the costs of the first are discharged.<sup>3</sup> Therefore, where on the trial of an ejectment the plaintiff was nonsuited, the judge believing the form of action to have been mistaken, and the plaintiff brought a second action against the same defendant, for the same cause, the court refused to stay proceedings until the costs of the former action were paid;<sup>4</sup> and where a plaintiff, who was the administrator of both husband and wife, brought trover as administrator of the wife, and suffered a nonsuit, and then brought suit for the same goods as the administrator of the husband, to whose estate the goods belonged; the court refused to stay proceedings until the costs of the former action were paid, on the ground that he did not unnecessarily vex the defendant.<sup>5</sup>

The practice of the courts to stay proceedings in a second suit until the costs of a former action for the same cause are paid, is a convenient and just mode of compelling the payment of costs due, as well to the officers of the court as to the party. And it will be adopted in the Supreme Court on the application of a proper party, though the first suit was in an inferior court and no bill of costs had been filed in it.<sup>6</sup>

If for the same cause of action, a variation in the names is immaterial.<sup>7</sup> And where an action was brought by A., assignee of B., the obligee in a bond, the court stayed proceedings until the costs of nonsuit in a previous action, instituted in the name of A., to the use of B., against the same defendant and on the same bond, were paid.<sup>8</sup>

<sup>1</sup> *M'Farland v. Brown*, 11 S. & R. 121, 122.

<sup>2</sup> *Cochran v. Perry*, 4 P. L. J. 319; 4 Mod. 379; 2 T. R. 511; 3 Dowl. & Ryl. 58; 2 W. Bl. 741.

<sup>3</sup> *Newton v. Bewley*, 1 Browne 38.

<sup>4</sup> *Cochran v. Perry*, 4 P. L. J. 319.

<sup>5</sup> *Cornelius v. Vanarsdallen*, 3 Barr 434.

<sup>6</sup> *Flemming v. Pennsylvania Ins. Co.*, 4 Barr 475.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Newton v. Bewley*, 1 Browne 38.

Where the plaintiff in a former ejectment between the same parties, for the same land, was *non-prossed*, the court continued the cause until the costs of the former suit were paid.<sup>1</sup>

Proceedings in ejectment will be stayed until the costs of a former ejectment, in which the present plaintiff was one of the defendants, are paid.<sup>2</sup>

The rule that the court will stay proceedings in a second action until the costs of a former on the same cause of action are paid, applies in cases where no *narr.* has been filed in the second action; it being incumbent on the plaintiff to show the court, by affidavit or otherwise, that the cause of action is not the same.<sup>3</sup>

Proceedings in a suit will be stayed until the costs in a previous suit between the same parties, for the same cause of action, but different in form, are paid.<sup>4</sup>

Application for a rule to stay proceedings until the costs of a former suit are paid, must be made to the court in banc.<sup>5</sup>

But the refusal of the court below to stay proceedings until the costs of a former suit are paid, is not the subject of a writ of error.<sup>6</sup>

Where the judgment is arrested on account of the insufficiency of the declaration, a new suit cannot be commenced for the same cause of action, until the costs are paid in the first suit, as in cases of verdict and judgment for defendant.<sup>7</sup>

By the Act of April 11th 1825,<sup>8</sup> but one attorney fee is taxable in several suits against the maker, acceptor, or endorser of notes or bills of exchange.

And by the Act of August 2d 1847,<sup>9</sup> § 12, where judgment is arrested on account of the insufficiency of the declaration, a new suit shall not be commenced for the same cause of action until the costs shall be paid in the first suit, as in cases of judgment for defendant.

#### 6. *Of costs after tender, and payment of money into court.*

By the Act of 1705, § 2, it is provided that where a tender is made of the amount of the debt or demand, previously to the institution of suit, which the plaintiff refuses to accept, the plaintiff is not entitled to recover costs;<sup>10</sup> but under this act, to entitle a defendant to recover costs from the plaintiff upon a plea of tender before suit brought, he must have pleaded a tender and paid the money into court.<sup>11</sup>

And it seems that payment must be made under a rule regularly obtained for that purpose, as a payment irregularly made cannot be recognised.<sup>12</sup>

And if the action was originally brought before a justice of the

<sup>1</sup> Hurst's Lessee v. Jones, 4 Dallas 353.

<sup>2</sup> Altman v. Altman, 2 Jones 246.

<sup>3</sup> Stiles v. Woodruff, D. C. C. P., 7 Leg. Int. 66.

<sup>4</sup> Koons v. Patterson, D. C. C. P., 9 Leg. Int. 11.

<sup>5</sup> Lessee of Plumsted v. Rudebagh, 1 Yeates 502.

<sup>6</sup> Withers v. Haines, 2 Barr 435.

<sup>7</sup> Act August 2d 1842, § 12, Pamph.

L. 460; Dunlop Dig., ed. 1849, 986; Purd. Dig. 808.

<sup>8</sup> Purd. Dig. 808; 8 Sm. Laws 471.

<sup>9</sup> Purd. Dig. 808, Pamph. L. 460.

<sup>10</sup> 1 Sm. Laws 49; Dunlop Dig., ed. 1849, 48.

<sup>11</sup> Sheredine v. Gaul, 2 Dallas 190; Seibert v. Kline, 1 Barr 38; Cornell v. Green, 10 S. & R. 14.

<sup>12</sup> Harvey v. Hackley, 6 Watts 264.

peace, the defendant must also have made the plea of tender before suit brought, and have offered the money to the plaintiff before the justice.<sup>1</sup> And this should appear on the alderman's record, in order to excuse the defendant from the payment of costs on appeal.<sup>2</sup>

Where the defendant has not made a tender before suit brought, he may tender afterwards the amount due, by paying it into court under a rule obtained for that purpose, together with the costs which have accrued up to that time; and if the plaintiff proceeds to trial, he will be liable to pay the subsequently accruing costs to the defendant if he becomes nonsuit, or fails to recover a greater amount than the sum paid into court.<sup>3</sup> The plaintiff may at any time before the trial, if he chooses not to proceed further, obtain the costs up to the time of the defendant's paying money into court; but if the defendant has incurred any subsequent costs, he must be allowed them.<sup>4</sup>

Where the plaintiff becomes nonsuit, or the defendant obtains a verdict, after payment of money into court, the defendant is entitled to costs;<sup>5</sup> and it would seem that in such cases the plaintiff is not entitled to the costs up to the time of the payment into court.<sup>6</sup>

And although after payment into court the defendant can never take it out, yet if the plaintiff becomes nonsuit, or fails in his action, the money, if not previously taken out, may be impounded to answer the defendant's costs.<sup>7</sup>

If the defendant plead a tender without paying the money into court, the plea, as far as it respects the tender, is a mere nullity.

The following rule has been adopted in the Common Pleas of Philadelphia:—

A defendant may upon motion, and before he pleads, pay into court the amount which he admits to be due, together with costs up to that time. The plaintiff may receive the amount so paid, and either enter a discontinuance, or proceed to trial, at his option. But in the latter case he shall pay all costs subsequently accruing, unless he recover judgment for a sum independently of that so admitted to be due and paid into court. § 1.<sup>8</sup>

### SECTION III.

#### OF COSTS ON A WRIT OF ERROR.

No costs were recoverable on a writ of error by the Statute of Gloucester, as no damages were recoverable therein. They were first given by statute 3 Henry VII., cap. 9,<sup>9</sup> against defendants who sue out a writ of error, afore execution had to reverse a judgment in favor of the plaintiffs, in case the judgment was affirmed, the writ

<sup>1</sup> Seibert v. Kline, 1 Barr 38.

<sup>2</sup> Dawson v. Collins, C. P. of P. Brightly on Costs 281.

<sup>3</sup> 1 T. R. 629; Ibid. 710; Arch. Pr., Lond. ed. 1840, 975; 2 Bos. & Pul. 56.

<sup>4</sup> 1 T. R. 629; Ibid. 710.

<sup>5</sup> 4 T. R. 10; 1 T. R. 710; Jenkins v.

Cutchens, 2 Miles 65.

<sup>6</sup> 3 T. R. 657; 4 T. R. 10, *vide* 1 T. R. 710, *contra*.

<sup>7</sup> Jenkins v. Cutchens, 2 Miles 65; Barnes 280.

<sup>8</sup> Rule XXIV.

<sup>9</sup> Rob. Dig. 107.



of error discontinued, or the plaintiff in error became nonsuit. This statute gave costs only to the plaintiffs on the affirmance of a judgment in their favor on a writ of error sued out by the defendants to reverse it. The statute 13 Car. II. cap. 2, § 10,<sup>1</sup> gives double costs to the defendants in error, in a writ of error sued out by any person to reverse a judgment *given after verdict* in any court of record, where the judgment shall be affirmed.<sup>2</sup>

The statute 8 and 9 William III. cap. 11, § 10,<sup>3</sup> provides that after judgment for defendants, if the plaintiff or demandant sue out a writ of error, and the judgment should be affirmed, the writ discontinued, or the plaintiff become nonsuit, the defendant shall have judgment to recover his costs against the plaintiff or demandant.

It is to be observed that all these statutes give costs on the *affirmance* of the judgment only, and no costs, therefore, are recoverable on the *reversal* of a judgment on a writ of error.<sup>4</sup> And where the plaintiff sued out a writ of error on a judgment in his favor, and the Supreme Court affirmed the judgment below, the plaintiff in error was held not to be entitled to costs. As where a judgment is reversed, the Supreme Court gives no costs; if costs are levied by execution, they will order the money received by the different officers to be refunded.<sup>5</sup>

When the Supreme Court reverses a judgment and orders a *venire de novo*, it has a right to impose terms as to costs; but where no terms are imposed the costs abide the final event of the suit.<sup>6</sup>

Where a party sues out a writ of error, and the judgment is affirmed, and the record is remitted to the court below, where the costs are taxed, he cannot maintain another writ of error to such taxation.<sup>7</sup> No question having been raised in the court below as to the costs of the suit, in action of covenant by vendor against vendee, the decision as to them is not the subject of review.<sup>8</sup> In an action of trespass, where there is a general verdict for a less amount than forty shillings on several counts, embracing injuries to both real and personal estate, the plaintiff is entitled to a judgment for full costs, as the court cannot separate the damages.<sup>9</sup>

Where a judgment in favor of the plaintiff was reversed on a writ of error sued out by the defendant below, the plaintiff having been obliged to pay the costs in error in order to take down the record to the Common Pleas, where a verdict and judgment was rendered in his favor, it was held that he was entitled to recover in *assumpsit* the costs incurred by the defendant in his writ of error, and which he was obliged to pay to remove the record.<sup>10</sup> But where the payment was not compulsory, the party paying them is not

<sup>1</sup> Rob. Dig. 138.

<sup>2</sup> This act is reported to be in force in Pennsylvania (see Rob. Dig. p. 138), but we are not aware that it is ever noticed in our practice. Brightly on Costs 195. See *Cameron v. Paul*, 1 Jones 277.

<sup>3</sup> Rob. Dig. 140.

<sup>4</sup> *Landis v. Shaeffer*, 4 S. & R. 199; *Work v. Lessee of Maclay*, 14 S. & R.

265; *Smith v. Sharp*, 5 Watts 292.

<sup>5</sup> *Wright v. Small*, 5 Binn. 204.

<sup>6</sup> *Work v. Maclay*, 14 S. & R. 295; *Heyer's Appeal*, 10 Casey 183.

<sup>7</sup> *Gibson v. Cummings*, 1 Casey 231.

<sup>8</sup> *Convers v. Vanatta*, 12 Harris 257.

<sup>9</sup> *Guffey v. Free*, 7 Harris 384.

<sup>10</sup> *Hamilton v. Aslin*, 3 Watts 222.

entitled to recover them; and therefore, where a judgment entered upon an award was reversed by the Supreme Court, and the defendant in error paid the costs and brought the record down in order to get the award to enforce it otherwise, it was held, that the payment of the costs was voluntary, and that he could not recover the amount for the defendant.<sup>1</sup>

#### SECTION IV.

##### COSTS ON APPEAL FROM ALDERMEN AND JUSTICES OF THE PEACE.

The Act of March 20th 1810<sup>2</sup> provided that the party appellant shall be bound with surety in the nature of special bail, "if the plaintiff, in a sum sufficient to cover all the costs which have or may accrue, with four dollars as counsel fee, and fifty cents per day for every day the appellee shall attend on such appeal, which the appellant shall be bound to pay if the judgment of the justice shall be affirmed by the court, or if he shall recover less than the amount of the judgment of the justice; if the defendant be the appellant, he shall be bound with surety as aforesaid, in a sum sufficient to cover the sum in controversy, all the costs, counsel fee, and daily pay as aforesaid, which he shall be bound to pay if the judgment of the justice shall be affirmed by the court, or if the plaintiff shall recover more than the amount of the judgment of the justice; but on the reversal or abatement of the amount of a judgment on an appeal, the defendant, if the appellant, shall be allowed his daily pay, counsel fee, and costs only, in case he produces no evidence before the court other than that which he exhibited before the justice or referees." But now by Act of March 20th 1845,<sup>3</sup> bail in appeal shall be bail absolute in double the probable amount of costs accrued, and likely to accrue, conditioned for the payment of all costs that may be legally recovered.

There was no provision in the Act of 1810 as to costs when the plaintiff appealed from a judgment of a justice in favor of the defendant for a sum certain, which the plaintiff reduced on the appeal; but it was ruled that, in such cases, the plaintiff was not entitled to costs.<sup>4</sup> But in a case in which a plaintiff having appealed from the judgment of a justice of the peace against him, recovered a judgment in his favor in court, it was ruled that he was entitled to have a judgment for full costs.<sup>5</sup> The court held that the costs, not being *taken away* by the act, although not *given* by it, were recoverable under the Statute of Gloucester.

By an appeal from the judgment of a justice, the plaintiff did not forfeit the costs accrued before the justice, though he did not recover on appeal more than he did before the justice.<sup>6</sup>

And upon a judgment by a justice for the plaintiff, an appeal to the Common Pleas by the defendant, a reference to arbitrators and

<sup>1</sup> Richardson v. Cassilly, 5 Watts 449.

<sup>2</sup> 5 Sm. Laws 161; Dunlop's Dig., ed. of 1849, p. 270; Purd. Dig. 599.

<sup>3</sup> Purd. Dig. 599, Pamph. L. 188.

<sup>4</sup> Bowman v. Bear, 3 S. & R. 308.

<sup>5</sup> Adams v. M'Ilheny, 1 Watts 53.

<sup>6</sup> Dearth v. Laughlin, 16 S. & R. 296.

award for defendant, an appeal by plaintiff, and a verdict for the plaintiff for a sum less than the judgment of the justice, the judgment must be without costs since the appeal from the justice.<sup>1</sup> And where, on an appeal from the judgment of a justice of the peace in favor of the plaintiff, the case was arbitrated, and an award made in favor of the plaintiff for the same sum, on which an appeal was entered, and on the trial the plaintiff was nonsuited, the defendant having given no evidence, the defendant was held entitled to costs.<sup>2</sup> Again, in a suit before a justice, judgment was rendered for the plaintiff for forty dollars, from which the defendant appealed to the Common Pleas, where the cause was arbitrated, and an award rendered for the defendant, from which the plaintiff appealed. The case was afterwards tried by jury, and a verdict and judgment given for the plaintiff for seventeen dollars, the defendant having produced new evidence: it was ruled that the defendant was liable to pay the costs which accrued before the justice, and to refund to the plaintiff the costs which he had paid on the appeal from the award of arbitrators, and that each party should pay his own costs which accrued subsequently to the award.<sup>3</sup>

The following is another illustration of the doctrine of costs under the two systems: Appeal by the defendant from the judgment of a justice in favor of the plaintiff for ninety-seven dollars: compulsory arbitration, and award for the plaintiff of one hundred dollars; appeal from the award by the defendant; trial in the Common Pleas, and verdict for the plaintiff for thirty-eight dollars: *Held*, that the plaintiff was not entitled to costs which accrued subsequently to the appeal.<sup>4</sup>

The plaintiff was entitled to costs, if, on an appeal by the defendant, the justice's judgment was *affirmed*, or if the plaintiff recovered *more*, whether new evidence was produced or not; but where the defendant appealed, and obtained a reversal or abatement of the amount of the justice's judgment, he was entitled to his daily pay of fifty cents, counsel fee of four dollars and costs, provided he produced no evidence before the court other than that which he exhibited before the justice or referees.<sup>5</sup> But if, when before the magistrate, he was refused time to prepare or produce his proof, or in case of judgment against him by default, the plaintiff refused his consent to a rehearing, the defendant was entitled to costs when he obtained a reversal or abatement of the amount of such judgment.<sup>6</sup>

On an appeal by a defendant from a justice of the peace, if the plaintiff recovered less in the Common Pleas than he did before the justice, and the defendant had produced evidence which he did not give before the justice, the plaintiff would recover his costs before the justice, but each party had to pay his own costs on the appeal.<sup>7</sup>

<sup>1</sup> Wiseler v. Beaumont, 4 Watts 29.

<sup>2</sup> Flick v. Boucher, 16 S. & R. 373.

<sup>3</sup> Ross v. Soles, 1 Watts 43; see 1 Pa. R. 477.

<sup>4</sup> Boyer v. Aurand, 2 Watts 74.

<sup>5</sup> See Downs v. Lewis, 13 S. & R. 198.

<sup>6</sup> Vide 1 Browne 202.

<sup>7</sup> Kimble v. Saunders, 10 S. & R. 193; Sanner v. Cooke's Admin., 16 Ibid. 167; and see also Franklin v. Wray, 1 Watts 129; Grace v. Altemus, 15 S. & R. 133; Downs v. Lewis, 13 Ibid. 198.

A defendant is entitled to appeal from an award in an original action in Common Pleas, where the amount is within a justice's jurisdiction, without payment of costs.<sup>1</sup> In an action of *assumpsit* for unskilfulness in performing a contract when the verdict does not exceed \$100, the plaintiff is not entitled to costs.<sup>2</sup> A defendant who appealed from the judgment of a justice, and obtained a general verdict in his favor, might recover costs, though he produced new evidence to the jury, if that evidence had been offered before the justice, but had been rejected by him as incompetent.<sup>3</sup> But where a judgment for costs was rendered for the plaintiff on an award for less than the justice's judgment, the Supreme Court refused to reverse it, because it did not appear on the record that no additional evidence was given to the arbitrators.<sup>4</sup>

The materiality of the new evidence adduced by the defendant, could not be inquired into on a question of costs; it was sufficient to preclude the defendant from recovering costs, that he produced new testimony.<sup>5</sup>

And the appellee was exonerated from the payment of costs, not only by the production of new facts, but also by the production of new evidence of the same facts; and, therefore, if witnesses were examined in court who were not produced before the justice, though to the same facts, the appellant, if defendant, was not entitled to costs.<sup>6</sup>

The whole system of costs on appeals from the judgment of magistrates, was changed by the Act of April 9th 1833,<sup>7</sup> which provides, "that the costs on appeals hereafter entered, from the judgments of justices of the peace and aldermen, shall abide the event of the suit, and be paid by the unsuccessful party as in other cases.

"*Provided*, That if the plaintiff be the appellant, he shall pay all costs which may accrue on the appeal, if in the event of the suit he shall not recover a greater sum, or a more favorable judgment than was rendered by the justice.<sup>8</sup>

"*And provided, also*, That if the defendant, either on the trial of the cause before the justice or referees, or before an appeal is taken, shall offer to give the plaintiff a judgment for the amount which the defendant shall admit to be due, which offer it shall be the duty of the justice and of the referees to enter on the record; and if the said plaintiff, or his agent, shall not accept such offer, then, and in that case, if the defendant shall appeal, the plaintiff shall pay all the costs which shall accrue on the appeal, if he shall not, in the event of the suit, recover a greater amount than that for which the defendant offered to give a judgment; and in both cases the defendant's bill shall be taxed and paid by the plaintiff, in the same manner as if a judgment had been rendered in court for the defendant." § 1.<sup>9</sup>

<sup>1</sup> Kerbaugh v. Curry, 2 Phil. R. 206.

<sup>2</sup> Lytle v. Morris, 2 Am. Law Reg. 120.

<sup>3</sup> McMillan v. Hall, 2 Pa. R. 73.

<sup>4</sup> Fitsimmons v. Leckey, 3 Ibid. 111.

<sup>5</sup> Feeny v. McFarland, C. P. MS. Whart. Dig. "Justice," 385, 480.

<sup>6</sup> Sanner v. Cooke, 16 S. & R. 167.

<sup>7</sup> Pamph. L. 480. Dunlop's Dig., ed. of 1849, 582; Purd. Dig. 600, § 70.

<sup>8</sup> McMaster v. Rupp, 10 Harris 298; Park v. Sweeny, 3 Wright 111.

<sup>9</sup> Shuey v. Bitner, 3 W. & S. 274; Shuff v. Morgan, 7 Barr 125.

By this act, costs are made to abide the event of the suit without regard to the amount recovered, or whether the judgment be or be not more favorable to the party entering the appeal. Under it, a defendant who proceeds in his appeal, is not entitled to recover a counsel fee of four dollars, as under the Act of 1810, and daily pay for his attendance on the appeal.<sup>1</sup>

The Act of 9th April 1833, which provides that the costs on appeals from justices of the peace shall "abide the event of the suit, and be paid by the unsuccessful party, as in other cases," applies to appeals in cases of trespass and trover.<sup>2</sup>

And where defendant appeals, and plaintiff obtains a verdict and judgment, he is entitled to full costs, although he finally recovers less than the alderman's judgment, and the report of arbitrators, from each of which the defendant appeals. The reasons given are, that costs are creatures of the statute; and where defendant is ultimately found indebted in any sum, which he neither paid nor offered to pay, or to confess judgment for, before appeal, he must pay all costs, not having brought himself within the exceptions.<sup>3</sup>

So, where the defendant appeals from a judgment of a justice of the peace in his favor, for a sum certain, and on the trial there is a verdict and judgment for the defendant, for a sum less than the amount of the judgment of the justice, he is entitled to full costs.<sup>4</sup>

Where a defendant recovered a judgment, before a justice, for a certain sum, and the plaintiff appeals, and the arbitrators in the Common Pleas award "no cause of action," neither party shall have costs, as the case is not within the statute.<sup>5</sup>

It has been held, in a case which occurred in the Common Pleas of Bradford county, that on an appeal from the judgment of a justice, as well when taken by plaintiff as by defendant, the court will, in some cases, for the purpose of justice and to determine the question of costs, ascertain by calculation whether the judgment obtained by the plaintiff in court, is for a greater sum or a more favorable judgment than was rendered by the justice. And where a plaintiff obtains before a justice all he asks, as the amount due to him upon a claim bearing interest, if he appeal, and subsequently in court recovers no more than the amount rendered in his favor by the justice, with interest superadded from that time, in such case he will be liable to pay the costs subsequent to the appeal.<sup>6</sup>

But this case would seem to be inconsistent with a decision of the Supreme Court, under the Arbitration Act, in which a plaintiff who appealed from an award in his favor, and recovered more than the sum awarded, but less than such amount, with interest, for the intermediate time, was allowed to recover full costs.<sup>7</sup>

The following decisions have been made as to what constitutes a

<sup>1</sup> Shuey v. Bitner, 3 W. & S. 275.

<sup>2</sup> King v. Boyles, 7 Casey 424.

<sup>3</sup> Lindsey v. Corah, 7 Watts 235; Bradford, 3 P. L. J. 239.

<sup>4</sup> Newhouse v. Kelly, 5 Ibid. 508.

<sup>5</sup> Holman v. Fesler, 7 W. & S. 313; Johnston v. Perkins, 1 Pa. R. 23;

see McDowal v. Glass, 4 Watts 339. Fresher v. Brenizer, 4 P. L. J. 377.

<sup>6</sup> Hoffman v. Slossan, 2 W. & S. 36.

<sup>7</sup> Davidson v. Smith, C. C. P. of

sufficient tender to exempt the defendants from costs, under the Act of 1833:—

A tender before a justice or referees, of a sum strictly equal to the debt sued for, is not equivalent to a tender of judgment; *although a tender of the debt and costs might be.* The defendant, therefore, is liable for the costs under the Act of the 9th of April 1833, although no more than the sum tendered be ultimately found due.<sup>1</sup>

But, in a late case, it was held, that it is not sufficient to relieve a defendant from the payment of costs accrued after appeal by him from a justice's judgment, that he has made a tender of the admitted sum, with the costs accrued. He must also have offered to give a judgment for such amount. The justice has authority to receive the money only on the foot of a judgment.<sup>2</sup>

After a verdict and judgment on an appeal from a justice, it is error in the court to receive depositions to prove that a tender had been made before the trial, under this act, so as to affect the question of costs.<sup>3</sup>

To exempt a defendant from, and to entitle him to costs, where the plaintiff is the successful party, the defendant must have offered, on the trial before the justice, or before appeal taken, to give the plaintiff judgment for a sum equal to or more than plaintiff eventually recovered. This offer the justice must enter on his record, as it cannot be proved by parol or other inferior evidence, and the justice is liable to the defendant for any injury sustained by him through his omission so to enter it;<sup>4</sup> and the offer is too late if made after appeal taken, though before the justice has made out his transcript.<sup>5</sup>

A certificate in the transcript of a justice, that the defendant offered to confess judgment for a certain amount, but of which there is no entry in the docket, is not sufficient to entitle the defendant to costs under the Act of 1833; nor, *it seems*, would the oath of the justice be admitted to prove the fact.<sup>6</sup>

In a suit before a justice, the defendant after judgment against him, but before appeal, offered to confess judgment for a less amount, which the plaintiff declined to agree to. An appeal was then entered, on which the plaintiff placed on the docket of the justice an acceptance of the offer. An award of arbitrators for a less amount than the offer, was made in the Common Pleas, for the plaintiff. *Held*, that the plaintiff was not entitled to his costs, and that the defendant might deduct his from the judgment.<sup>7</sup>

In a suit before a justice of the peace, the defendant offered to confess judgment for five dollars and costs of suit. The plaintiff declined to accept it, and judgment was rendered by the justice for the plaintiff, for seventy cents. The plaintiff appealed, and recovered judgment in court for eighty-six cents: *Held*, that under the first section of the Act of 9th April 1833, the plaintiff was entitled to full costs.<sup>8</sup>

<sup>1</sup> McDowell v. Glass, 4 Watts 389.

<sup>2</sup> Dickerson v. Anderson, 4 Whart. 78.

<sup>3</sup> McDowell v. Glass, 4 Watts 389.

<sup>4</sup> Seibert v. Kline, 1 Barr 38; Gardner v. Davis, 3 Harris 41.

<sup>5</sup> Bogart v. Rathbone, 1 Barr 188.

<sup>6</sup> Clemens v. Gilbert, 2 Jones 255.

<sup>7</sup> Gardner v. Davis, 3 Harris 41.

<sup>8</sup> McMaster v. Rupp, 10 Harris 298.

Where judgment is entered by the justice for the plaintiff, respectively in such actions, and one of the defendants appeals, and afterwards on the trial of the cause in court under the plea of set-off, interposes his judgment before the justice, against the plaintiff's claim, and thereby obtains a verdict in his favor, the judgment thereon must be entered without costs, and judgment for the costs against the defendant.<sup>1</sup>

Where a plaintiff sues in the Common Pleas for a demand exceeding \$100, without having filed a previous affidavit, and recovers less than that amount, the pleas being payment and set-off, and the court below gives judgment for costs, it will be presumed in the Supreme Court, that the claim was reduced below \$100, by evidence of set-off.<sup>2</sup> A judgment in favor of defendant for costs, warrants an execution against the legal as well as the equitable plaintiff.<sup>3</sup>

A plaintiff recovered a judgment before a justice for \$85, in an action of trespass; the defendant appealed, and there was an award of arbitrators finding "no cause of action;" from this the plaintiff appealed, and, on the trial, recovered a verdict for ten cents damages: *Held*, that the verdict carried full costs.<sup>4</sup>

When defendant entitles himself to costs by reducing the amount of the judgment appealed from, after an offer to confess a judgment for less, the court will set off the amount of the costs against the amount of the verdict.<sup>5</sup>

The Act of 20th of March 1845,<sup>6</sup> provides "that the bail in cases of appeal from the judgments of aldermen and justices of the peace, and from the award of arbitrators, shall be bail absolute in double the probable amount of costs accrued, and likely to accrue in such cases, with one or more sufficient sureties, conditioned for the payment of all costs accrued, or that may be legally recovered in such cases, against the appellants." Although this act has been held to abolish the special requirements of the Act of 1836, in reference to appeals from the awards of arbitrators,<sup>7</sup> it does not appear in any manner to have affected the right to costs on appeals from judgments of aldermen and justices of the peace, as regulated by the Act of 1833.<sup>8</sup>

## SECTION V.

### COSTS OF REFERENCE AND ARBITRATION.

#### 1. *Of costs of voluntary arbitration.*

The subject of costs in relation to awards, is to be considered, as previously intimated, first, on references under the English law, and under the Act of 1836, which appears to supersede the Acts of 1705 and 1806.

<sup>1</sup> *Groff v. Ressler*, 3 Casey 71.

<sup>2</sup> *Minich v. Minich*, 9 Casey 378.

<sup>3</sup> *Gifford v. Gifford*, 3 Casey 202.

<sup>4</sup> *King v. Boyles*, 7 Casey 424.

<sup>5</sup> *Magill v. Tomer*, 6 Watts 494.

<sup>6</sup> Pamph. L. 188; Dunlop Dig., ed.

1849, p. 1035.

<sup>7</sup> See *post* 758.

<sup>8</sup> *Clemens v. Gibbs*, 2 Jones 255; *Gardner v. Davis*, 3 Harris 41. See *ante* 746.

Where there is no cause in court, the award as to costs depends entirely upon the terms of the submission; if the submission give the arbitrator no authority as to costs, he cannot award them. But where authority is given to him upon that subject, he may order either party to pay the costs, or each to pay a moiety, unless the submission require that the costs abide the event; or if the award be silent as to costs, each party must pay his own costs, and the costs of the reference equally.<sup>1</sup>

Where there is a cause in court, the award, as to the costs of the *reference*, depends upon the terms of the rule or order under which the cause is referred, in the same manner as where there is no cause in court, as above mentioned; and if the rule or order give the arbitrator no authority as to costs, he cannot award them.<sup>2</sup> But if, by the rule or order of reference, the costs, generally, are to abide the event, this includes the costs of the reference as well as the costs of the cause, according to the practice of the King's Bench;<sup>3</sup> although the rule is otherwise in the Court of Common Pleas.<sup>4</sup>

But as to the costs of the *action*, the arbitrator may order either party to pay them, without any express authority being given to him upon that subject by the rule or order of reference.<sup>5</sup> If by such rule or order, however, the costs are to abide the event, the arbitrator cannot exercise any discretion in the awarding of them; but the party who would have been entitled to costs if the action had proceeded shall be entitled to them under the award; and to the same amount, and under the same circumstances: and, therefore, where a plaintiff in trespass would be entitled only to as much costs as damages, he shall have no more under the award.<sup>6</sup> Where an award finds *costs*, without mentioning how much, it shall be intended such costs as are by law allowed in the case;<sup>7</sup> as if an award be given in slander for 40*s.* with costs, it shall be intended no more costs than damages. But it is otherwise where *full costs* are given,<sup>8</sup> or *costs of suit*;<sup>9</sup> since the statute of James I. restraining costs in slander, where the damages are under 40*s.*, though binding on the court, is not so upon the jury.<sup>10</sup>

Referees under the Act of 1705 cannot award costs of suit in the Common Pleas upon a sum which, by the laws giving jurisdiction to justices of the peace, will not carry costs, unless there is an agreement in the rule that they shall have power over the costs, or the plaintiff had made and filed an affidavit before the suit was brought, that he believed the debt was beyond the sum within a magistrate's jurisdiction.<sup>11</sup> So, under the Act of Assembly, which provided that a defendant who appealed from the judgment of a justice should not be subject to costs, where less was recovered against him on the appeal than the amount of the judgment or award appealed from,

<sup>1</sup> Arch. Pr. 1235.

<sup>2</sup> Ibid. "Wills," 64; Taunt. 213; see

<sup>3</sup> Ibid. 165.

<sup>4</sup> 9 East 436.

<sup>5</sup> 1 B. & P. 34.

<sup>6</sup> Young v. Shook, 4 Rawle 299; 2 T. R. 644; 14 Johns. 161.

<sup>7</sup> 2 Arch. Pr. 288.

<sup>8</sup> Stuart v. Harkins, 3 Binn. 321.

<sup>9</sup> Ibid.

<sup>10</sup> Gower v. Clayton, 6 S. & R. 85.

<sup>11</sup> Stuart v. Harkins, 3 Binn. 321. Hinds v. Knox, 4 S. & R. 417.

<sup>12</sup> Guier v. McFaden, 2 Binn. 587; Lewis v. England, 4 Ibid. 15.



unless he produced new evidence, neither a jury nor arbitrator could give costs.<sup>1</sup> For these provisions as to the payment of costs in references, on certain events, may be considered as *restrictions*, which take away as effectually the power of arbitrators over costs, as those inserted in a submission to reference at common law.<sup>2</sup>

Costs are seldom or never specified in reports of referees in actions of ejectment, yet they will be allowed to the plaintiff, although the referees should award in his favor without finding costs. References in such cases are entered into to ascertain in whom the title is, and the costs are consequential thereon.<sup>3</sup>

Costs may be given under the Statute of Gloucester, by the court to which a report of referees is made under the Act of 1705, though not found by the referees.<sup>4</sup>

Where the arbitration fails to provide specifically for the payment of costs, the case is governed by the statutes regulating appeals from justices of the peace.<sup>5</sup>

Where there was an agreement to refer all matters in variance between the parties—there being no pending action or agreement to institute such action, and no rule of court was obtained, but the award was filed under the 1st section of the Act of 21st March, 1806, and afterwards set aside on exceptions filed on account of the misconduct of one or more of the arbitrators—it was then agreed, upon the suggestion of the court, that the case should stand as a cause in court, as though upon an amicable action filed. The case was put at issue, tried, and a verdict rendered for plaintiff, the prothonotary having allowed the costs of the arbitration. The court, on appeal from his taxation, was of opinion that the agreement did not make the reference a part of the proceedings in court, and the costs of witnesses and arbitrators, and of depositions to sustain the award, were disallowed from the plaintiff's bill.<sup>6</sup>

Referees, under the Act of 1806,<sup>7</sup> are allowed each one dollar per day for their services, which sum is taxed with the other costs of suit; "but if either party do not appear on the day appointed for the referees to meet, the party neglecting to appear, either by himself, his agent, or attorney, shall be liable for all costs which may have accrued on that day in the action, unless it be made appear to the satisfaction of the referees that the absent party could not attend."<sup>8</sup>

By the third section of the same act,<sup>9</sup> if the plaintiff file exceptions to an award under this act, "and the same is finally set aside, and he shall again prosecute his action, either in a court of justice or before other referees, and shall not recover a sum equal or greater than was first awarded, he shall not have judgment for costs, and shall pay the defendant seventy-five cents per day, while attending

<sup>1</sup> *Lewis v. England*, 4 Binn. 5; *Guier v. McFaden*, 1 Ash. 1.

<sup>2</sup> *Ibid.*; *sed vide*, *Bedford v. Shilling*, 4 S. & R. 409; *Lentz v. Stroh*, 6 *Ibid.* 30.

<sup>3</sup> *Harvey v. Snow*, 1 Yeates 150.

<sup>4</sup> *Bellas v. Levy*, 2 Rawle 21.

VOL. I.—48

<sup>5</sup> *Addison v. Hampson*, 6 Barr 463.

<sup>6</sup> *Smith v. Farley*, D. C. C. C. P., April 7th 1849. MS.

<sup>7</sup> *Purd. Dig.* 52, 809, § 51.

<sup>8</sup> § 4, 4 Sm. Laws, 328; not re-enacted in the Act of 1836.

<sup>9</sup> *Purd. Dig.* 52; 4 *Smith* 326.

on the same; and if the defendant file such exceptions, and the award be set aside by the court, and the plaintiff by a new action shall recover a sum equal or greater than the original award, then and in that case the plaintiff shall have judgment for all the costs accrued on such suit, together with seventy-five cents per day whilst attending the same."<sup>1</sup>

2. *Of costs in compulsory arbitration.*

The arbitrators have no power to award costs when they find for the plaintiff in a sum below the jurisdiction of the court.<sup>2</sup> And although they award that each party shall pay his own costs, yet if the sum awarded carry costs, or if it have been reduced below one hundred dollars by a set-off (the affidavit under the Act of Assembly being previously filed), the plaintiff is entitled to costs.<sup>3</sup> Where an award was made in favor of the plaintiff for a sum within the jurisdiction of the court, and "that the plaintiff pay the costs," the court directed judgment to be entered for the plaintiff with costs.<sup>4</sup> But it has been determined that a Court of Common Pleas has no authority to do this; for they have no power to alter an award of arbitrators, even if it be illegal on the face of it.<sup>5</sup> If, therefore, arbitrators award costs to a party who is not entitled to them, the court cannot enter judgment on the award without costs; but the dissatisfied party must appeal to the Court of Common Pleas, or bring it before the Supreme Court, by writ of error.<sup>6</sup> Every intendment, however, will be made in the latter court, in favor of the regularity of proceedings which are according to the course of the common law, and a judgment is consequently not to be reversed for anything but palpable error. A judgment, therefore, by arbitrators, for a less sum than the magistrate awarded will not be reversed, unless it affirmatively appears on the record that no other evidence was given to the arbitrators than was heard by the magistrate.<sup>7</sup>

The 27th section of the Act of 16th June 1836,<sup>8</sup> provides that no appeal shall be allowed to either party from an award of arbitrators, until the appellant pay all the costs that may have accrued on such suit or action. A subsequent section, however, authorizes an appeal by executors or administrators, or person suing, or being sued in a representative capacity, without a compliance with this rule, if such appellant shall not have taken out the rule of reference. § 31.

A municipal corporation has been held to be within the proviso contained in the 31st section of the Act of 1836, allowing persons suing or being sued, in a representative capacity, to appeal without payment of costs.<sup>9</sup> But where an action is brought on the transcript of a guardian's account, filed in the Common Pleas, which is arbitrated, the guardian, being sued as a defaulter, cannot appeal from the award, without the payment of costs.<sup>10</sup>

<sup>1</sup> *Deviney v. Reeder*, 1 Pa. R. 399; *Work v. McClay*, 14 S. & R. 265; *Brightly on Costs* 285.

<sup>2</sup> *Lindenburger v. Unruh*, 1 Browne 194; *Heath v. Atkinson*, *Ibid.* 231; see, also, *Lewis v. England*, 4 Bin. 5.

<sup>3</sup> *Spear v. Jamieson*, 2 S. & R. 330.

<sup>4</sup> *Moffet v. Dorsey*, 2 Browne 24.

<sup>5</sup> *Post v. Sweet*, 8 S. & R. 391.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Fitzimmons v. Leckey*, 3 Pa. R. 111.

<sup>8</sup> Pamph. L. 717; *Dunlop Dig.*, ed. 1849, 793; *Purd. Dig.* 56.

<sup>9</sup> *Robinson v. Jefferson County*, 6 W. & S. 16.

<sup>10</sup> *Royer v. Myers*, 3 Harris 87

And the Act of 15th March 1847,<sup>1</sup> provides that when any corporation (municipal corporations excepted), being sued, shall appeal or take a writ of error, the bail requisite in that case shall be taken absolute for the payment of debt, interest, and costs, on the affirmance of the judgment.

The appellant must also pay the costs of a former award which had been set aside by the court, when they impose no conditions as to the payment of the costs. According to the usual practice, it is understood that they are to abide the final event of the suit; they are thrown into the general mass of costs, and it is as much incumbent on the appellant to pay them, as any other costs previous to the entry of an appeal.<sup>2</sup>

But where the first rule of reference was not acted on, but was stricken off by order of the party who had entered it, it was held that the other party was not liable to the costs of such prior rule of reference, as he had done nothing to prevent its being carried into operation.<sup>3</sup> On an award in favor of a plaintiff in a *scire facias* to revive a judgment, the defendant on appealing from the award, is only bound to pay the costs of the action of *scire facias*, and not those of the original judgment.<sup>4</sup>

After payment of the costs taxed to the time of the appeal, the appeal cannot be dismissed because the appellant refuses paying other costs which had not been taxed at that time. But payment may be enforced by an order of court, and by attachment on non-compliance.<sup>5</sup> The costs to be paid by the appellant, shall nevertheless be taxed in the appellant's bill, and recovered of the adverse party in such cases only where, in the event of the suit, the appellant is entitled to recover costs agreeably to the provisions contained in the act.<sup>6</sup>

If the costs have been paid, the appeal is not affected by the appellant directing the prothonotary not to pay them over, which order is a mere nullity, and ought to be so treated.<sup>7</sup>

The payment of costs on the appeal was regulated by the 29th and 30th sections of the act which formed a complete system as to them. The 29th section directed that "if the plaintiff be the appellant, he shall by himself, his agent, or attorney, with one or more sufficient sureties, be bound in recognisance with the prothonotary, the condition of which shall be, that if the said plaintiff shall not recover in the event of the suit, a sum greater, or a judgment more favorable than the report of the arbitrators, he shall pay all costs that shall accrue in consequence of said appeal, and one dollar per day for each and every day lost by the defendant in attending on such appeal.

And "if the defendant be the appellant, he shall by himself, his

<sup>1</sup> Pamph. L. 361, Dunlop Dig., ed. 1849, 1100.

<sup>2</sup> Per TILGHMAN, C. J.; Seely v. Barton, 5 S. & R. 390.

<sup>3</sup> Fleetwood v. Vanatta, 1 Ash. 10.

<sup>4</sup> Hill v. Thomas, D. C. Phila., May 1827, MS.

<sup>5</sup> Fraley v. Nelson, 5 S. & R. 234; McKeown v. Boudinot, 1 Browne 150; Williams v. Hazlep, 2 Harris 158; Stewart v. Jewell, 11 S. & R. 359; Walter v. Bechtol, 5 Rawle 228.

<sup>6</sup> Act 16th June 1836, § 32.

<sup>7</sup> Duffie v. Black, 1 Barr 388.

agent, or attorney, produce one or more sufficient sureties, who shall enter into a recognisance with the prothonotary in the nature of special bail, the condition of which shall be, that if the plaintiff in the event of the suit shall obtain a judgment for a sum equal to, or greater, or a judgment as, or more favorable than the report of the arbitrators, the said defendant shall pay all costs that may accrue in consequence of said appeal, together with the sum or value of the property or thing awarded by the arbitrators, with one dollar per day for every day that shall be lost by the plaintiff in attending to such appeal, or in default thereof, shall surrender the defendant to the jail of the proper county. § 30.<sup>1</sup>

This recognisance bound the defendant to the payment of costs even where the plaintiff had forfeited his title to them by the infringement of some other Act of Assembly.<sup>2</sup> In a case where the plaintiff had commenced his action in the Common Pleas, which was arbitrated by the defendant, and an award for eighty dollars made, from which the defendant appealed, and the plaintiff afterwards obtained a verdict for eighty-six dollars; it was held that the defendant was subject to the payment of all costs subsequent to the appeal, but not of any costs prior to the appeal. The reason was, that though the plaintiff forfeited costs by instituting an action in the Common Pleas which was within the jurisdiction of a justice, yet the defendant by his appeal, bound himself to comply strictly with his recognisance, and to pay costs on failing in the appeal.

In order to entitle himself to this daily allowance, it seems that it was not necessary that the party should attend in proper person on the appeal, inasmuch as his attorney in fact or his substitute can recover it; but it seems that the attorney at law is not so entitled.<sup>3</sup> Although there were several defendants entitled to the costs of an action, they could recover but for the daily attendance of one.<sup>4</sup>

On an appeal from the prothonotary's taxation of costs on award of arbitrators in which two cases had been tried together: *Held*, 1. That the arbitrators were entitled to fees as for only one case; 2. That attorney's fees were properly chargeable on the award; 3. That a reasonable charge for room-rent for the arbitration was correct, and sanctioned by ancient practice.<sup>5</sup>

Where there were several suits by several plaintiffs against the same defendants, and the causes were referred to arbitrators under the Act of 1810, and an agreement made that one case should be tried before the arbitrators, and that they should return the same award in each of the other cases, and an award was made in each case for the defendant, from which the several plaintiffs appealed, and the cases were all set down for trial at the same term, and one case was tried and a verdict given for the defendant, after which the other plaintiffs discontinued; the defendant was held entitled to recover the per diem allowance given by the Act of Assembly, from each of the plaintiffs.<sup>6</sup>

<sup>1</sup> Act of 1836.

<sup>2</sup> *Ilgenfritz v. Douglass*, 6 Binn. 402.

<sup>3</sup> *Clay v. Karsper*, 1 Browne 290.

<sup>4</sup> *Shermer v. Rusling*, 1 Miles 415.

<sup>5</sup> *Butcher v. Scott*, C. P. C. C. P., 2 P. L. J. 287.

<sup>6</sup> *Horner v. Harrington*, 6 Watts 331.

In every action, whether of *tort* or contract, arbitrated under this law, either party had the right of appeal from an award in order to a trial by jury; and in the event of a jury not finding in his favor, as to the whole cause of action, but finding a verdict more favorable than the award, he was exempted from all costs which accrued on the appeal. In other words, a party appealing, if he succeeded in any degree, was not liable to the costs subsequent to the appeal. "The reason of this is most apparent; the party, by the verdict, is found to be aggrieved by the award; in seeking redress, costs are necessarily incurred, by the party persisting in the unjust award he has obtained; it is neither just nor reasonable that he should pay that party these costs; he should not be damnified by appealing for redress from an unjust sentence, which injustice is established by a verdict."<sup>1</sup> As the recognisance of the party appealing was to cover all the costs, that the other could recover; he was not liable to pay costs in any event, for which his recognisance was not a security.<sup>2</sup>

The governing principle in the system of costs resulting from the three sections before quoted from the act, was, that the appellant should pay costs, unless he succeeded, at least partially, in the appeal. "If the plaintiff appeals he pays costs, unless he recovers more than the arbitrators gave him. If the defendant appeals, he pays costs, unless he obtains an *abatement* of what the arbitrators gave the plaintiff, because in both these cases it must be presumed that there was no cause for the appeal. But although the party who succeeds but partially in his appeal, ought not to *pay* costs, yet it does not follow that he ought to *recover* costs; because, although the event has proved that the award of the arbitrators was wrong, yet that may have been the fault of the arbitrators, and not of the party in whose favor the award was made. In such cases, therefore, each party is left to pay his own costs."<sup>3</sup> In such cases the adduction of new evidence on the trial did not affect the defendant's right of exemption from the costs after the appeal.<sup>4</sup>

Where a plaintiff who sued on a bond, appealed from the award of arbitrators finding the amount demanded for her as trustee, &c., and recovered the same amount in her own right, by a verdict and judgment, it was *held*, that this was a judgment more favorable than the award, in the sense of the words as used in the act relating to arbitration, and carried the costs since the appeal.<sup>5</sup>

A plaintiff appealing and recovering more than the award, though less than the awarded amount, with interest for the intermediate time, was entitled to full costs; the only practical criterion being the difference of amount finally recovered without reference to the elements of the verdict.<sup>6</sup> And if the plaintiff in ejectment obtained a verdict and judgment less favorable than the award of arbitrators appealed from by the defendant, the plaintiff was not entitled to

<sup>1</sup> *Lentz v. Stroh*, 6 S. & R. 34.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Landis v. Shaeffer*, 4 S. & R. 196;  
*Rankin v. Murry*, 2 Pa. R. 74.

<sup>4</sup> *Carney v. Kenney*, 1 Miles 9.

<sup>5</sup> *Fresher v. Brenizer*, 4 P. L. J. 377.

<sup>6</sup> *Haines v. Moorhead*, 2 Barr 65.

costs subsequent to the appeal; nor could the defendant recover back the costs paid by him on the appeal.<sup>1</sup>

In the case, then, of an appeal by a defendant from an award of arbitrators, if the plaintiff obtained a verdict for a smaller sum than the award, the defendant was not entitled to a return of the costs paid on the appeal; and with respect to the costs accrued since the appeal, each party paid his own costs.<sup>2</sup> Nor as regards the costs, did it make any difference whether the cause was tried after the appeal by a jury, or referees under the Act of 1705; in such case, therefore, referees could not award costs to the plaintiff.<sup>3</sup> This same principle prevails in the common-law courts; for where a judgment of an inferior court is *reversed* on a writ of error, the costs in error are not recovered by the party who obtains the reversal. But, where the judgment is *affirmed*, costs are recovered. On an appeal from arbitrators, the law considered their report as *reversed*, where the judgment of the Court of Common Pleas is more favorable to the appellant than the report was.<sup>4</sup>

A plaintiff, nonsuited on appeal by defendant, must refund the costs paid on appealing, although the plaintiff may be administrator.<sup>5</sup>

But when the plaintiff appeals from an award of arbitrators in favor of the defendant and recovers, he is entitled to the costs which he paid on entering his appeal, as well as those costs which have accrued since.<sup>6</sup> So where the plaintiff appealed from an award in his own favor, and obtained a verdict for a greater sum, because he was entitled to recover costs upon the award from which he appealed.<sup>7</sup> In such a case, it might be questionable whether the plaintiff could be obliged to pay, before he appealed, any more than the mere costs of the prothonotary. The last would seem to require payment only of such costs as *have* accrued, and, as the award is favorable to him, it seems clear that none have accrued for which *he* is liable. The Court of Common Pleas (Philadelphia) has, however, held otherwise; and the Supreme Court, in the last-cited case, sanctions impliedly that decision.<sup>8</sup> It presents a case for legislative interference; for, independently of its apparent injustice, the appellees are often irresponsible by the time they are called upon to return the costs.

If the defendant obtains a total reversal of the award, he is entitled to the costs which follow a final judgment. Such a case is not within the provisions of the Act of 1810, as to costs; they are given by the law as it existed before the passage of that act.<sup>9</sup>

Very material changes in the law of costs on appeal from awards of arbitrators were produced by the Act of 12th of July 1842,<sup>10</sup> abolishing imprisonment for debt; and by the Act of March 20th 1845.<sup>11</sup> The latter act provides: "That in lieu of the bail hereto-

<sup>1</sup> *Bellas v. Oyster*, 7 Watts 341.

<sup>2</sup> *Pratt v. Naglee*, 6 S. & R. 299;

*Holdship v. Alexander*, 13 S. & R. 230.

<sup>3</sup> *Ibid.*; see *Poke v. Kelly*, 13 S. & R. 165.

<sup>4</sup> *Landis v. Shaeffer*, 4 S. & R. 196.

<sup>5</sup> *Penrose v. Pawling*, 8 W. & S. 379.

<sup>6</sup> *Commonwealth v. Shannon*, 13 S.

& R. 109.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Copeland v. Hocker*, C. P. MS. 1827.

<sup>9</sup> *McLanahan v. Wyant*, 1 Pa. R. 113.

<sup>10</sup> Pamph. L. 339; *Dunlop Dig.*, ed. 1849, 971.

<sup>11</sup> Pamph. L. 188; *Dunlop Dig.*, ed. 1849, 1035; *Purd. Dig.* 57.

fore required by law in the cases herein mentioned, the bail, in cases of appeal from the judgments of aldermen and justices of the peace, and from the award of arbitrators, shall be bail absolute in double the probable amount of costs accrued, and likely to accrue, in such cases, with one or more sufficient sureties, conditioned for the payment of all costs accrued, or that may be legally recovered in such cases against the appellants." § 1.

The effect of the Act of 1842 was to abolish the recognisance of special bail on appeal from an award required by the 30th section of the Act of 1836, as inconsistent with the design of that act.<sup>1</sup> And as, under the 1st section of the Act of March 20th 1845, the special requirements of the Act of 1836 are not revived, the costs follow the event of the suit; and a plaintiff is entitled to costs incurred after an appeal by defendant from an award of arbitration, in which the plaintiff obtains a verdict less than the award.<sup>2</sup> The effect of that enactment is to supersede also the form of recognisance on appeal; and a recognisance acknowledged by a plaintiff appellant, after the Act of 1845, conditioned that the plaintiff would pay all costs "with one dollar for each and every day that should be lost by the defendant in such appeal," according to the provisions of the Act of 1836, was held to be void.<sup>3</sup> The Act of 20th March 1845, however, does not interfere with the provision of the Act of 1836, requiring payment on appeal of all costs due in the action up to that time.<sup>4</sup>

## SECTION VI.

### OF COSTS IN ACTIONS BY AND AGAINST PARTICULAR PERSONS.

In England, prior to a late statute,<sup>5</sup> in actions brought by executors or administrators, if the verdict were given for the defendant, the plaintiff in such case was not liable for costs,<sup>6</sup> unless the cause of action accrued after the testator's death,<sup>7</sup> and the plaintiff might have brought an action in his own name. Also, previously to that act, the plaintiff was not liable to the costs of a nonsuit unless the action were such that he might have brought it in his own name; nor to costs on judgments as in case of a nonsuit.<sup>8</sup> In an early case in Pennsylvania, the Supreme Court determined that the rule of the English law in this respect had been introduced into Pennsylvania. and that, consequently, on the discontinuance of a suit brought by an executor or administrator, although he was personally liable for the fees of the officers of the court, for services rendered to him, he

<sup>1</sup> *Beers v. West Branch Bank*, 7 W. & S. 365; *Remely v. Kuntz*, 10 Barr 180.

<sup>2</sup> *Cameron v. Paul*, 1 Jones 277, affirming *Remely v. Kuntz*, 10 Barr 180.

<sup>3</sup> *Shuff v. Morgan*, 7 Barr 125.

<sup>4</sup> *Merrit v. Smith*, 2 Barr 161. It has been thought proper to give the decisions under the Act of 1836, although it will be perceived that its substantial provisions have been abolished by the Act of 1845, as well for the purpose of

tracing the history of the law on the subject, as because they may prove useful as decisions on cases arising under analogous branches of the law.

<sup>5</sup> 3 & 4 W. 4, c. 42, § 31.

<sup>6</sup> 1 *Ld. Raym.* 436; *H. Bl.* 528; 1 *B. & P.* 445.

<sup>7</sup> 7 *T. R.* 358; 10 *East* 293; 5 *T. R.* 234.

<sup>8</sup> 2 *Dowl.* 388; 2 *C. & M.* 401; 2 *H. Bl.* 297; 4 *Burr.* 1928.

was not liable *de bonis propriis*, for the costs of the defendant.<sup>1</sup> The ground of the distinction taken between fees and costs being, that costs are an allowance to a party for expenses incurred in conducting his suit; while fees are a compensation to an officer, for services rendered in the progress of the cause, which originally were in strictness demandable the instant at which the services were rendered.<sup>2</sup> But this decision, so far as it affects the defendant's costs, is now overruled, and an executor or administrator who fails in a suit instituted by himself is bound to pay costs, as well when he sues in his representative capacity, as when the cause of action arises after the death of the testator or intestate.<sup>3</sup>

Executors and administrators are liable for costs *de bonis propriis*, when, upon a plea of *plene administravit*, a verdict is found against them.<sup>4</sup> So when they have suffered a *non pros.*<sup>5</sup> So when they plead a false plea.<sup>6</sup> In all other cases where an executor is liable for costs, they are to be levied *de bonis propriis*, if there be no goods sufficient of the testator to satisfy them.<sup>7</sup>

In actions by, as well as against executors or administrators, if they have a verdict, they are of course entitled to costs as in other cases.<sup>8</sup> So if one of several issues be found for them—as if they plead the general issue and *plene administravit*, and issues be taken on both, and the issue on *plene administravit* be found for, and the other issue against them—they are entitled to costs.<sup>9</sup>

Executors and administrators, whether plaintiffs or defendants, are exempt from the payment of costs on an appeal from an award against them, under the Compulsory Arbitration Law of 1810, § 14.<sup>10</sup> The act provides that, where they are the party appellant, they shall have an appeal, as is by law allowed in other cases; that is, they may appeal without restrictions in the 11th, 12th, 13th, and 14th sections, which are unsuitable in the case of executors and administrators.<sup>11</sup> When the right of appeal was given as is by law allowed in other cases, the legislature must necessarily have meant other cases of appeal, as they stood independently of compulsory arbitration, wherein neither an affidavit, payment of costs, or giving a recognisance were made essential prerequisites to an appeal.<sup>12</sup> “This exemption with regard to executors or administrators is evidently just, because being merely trustees for the rights of others, and not supposed to be as well acquainted with the matter in contest as their testator or intestate, it would be hard to make them pay costs which in the event of the suit they might never recover again.”

The same exemption is given by the 31st section of the Arbitration

<sup>1</sup> *Musser v. Good*, 11 S. & R. 247.

<sup>2</sup> *Ibid.* 248.

<sup>3</sup> *Muntorf v. Muntorf*, 2 Rawle 180; *Penrose v. Pawling*, 8 W. & S. 380; *Show v. Conway*, 7 Barr 136; *Ewing v. Furness*, 1 Harris 531, overruling the case in 5 Pa. L. J. 505.

<sup>4</sup> *Swearingen v. Pendleton*, 4 S. & R. 396.

<sup>5</sup> *Musser v. Good*, 11 S. & R. 247.

<sup>6</sup> See 3 Burr. 1368; 1 W. Bl. 400.

<sup>7</sup> Arch. Pr. 881-2.

<sup>8</sup> *Ibid.*

<sup>9</sup> 1 Barn. & Ald. 254; and see 2 Arch. Pr. 133, 881.

<sup>10</sup> 5 Sm. Laws 136.

<sup>11</sup> *Insurance Co. of Penna. v. Hewes*, 5 Binn. 510.

<sup>12</sup> Per YEATES, J., *Ibid.* 511.



Act of 1836, if such appellant shall not have taken out the rule of reference,<sup>1</sup> and is extended also to minors. And the same exemption from the payment of costs on appeal from an award of arbitrators is contained in the 2d section of the Act of 13th April 1846.<sup>2</sup> Where executors, administrators, guardians, or trustees are appellants, they may also sue out a writ of error without security for costs,<sup>3</sup> so as to be a *supersedeas*; and they may appeal from a judgment of the Supreme Court at Nisi Prius to it in banc, without surety, under the provisions of the 6th section of the Act of 26th July 1842.<sup>4</sup>

In actions against executors for legacies, the justices of the courts respectively, upon consideration of the report of their account, shall, according to justice and equity, either award no costs, or costs out of the testators' estate, or in case they have been faulty, in delaying to pay the legacy demanded, or a proportional part thereof, without sufficient excuse, then out of the proper estate of the executors.<sup>5</sup>

Where an executor or administrator prosecutes a claim of the estate in good faith and fails, he is not personally liable for the costs in the cause. "Now although," says Gibson, J.,<sup>6</sup> "by the English law, an executor is liable for costs where he has suffered a *non pros.*, the rule is different where he has entered a discontinuance; and this brings the inquiry to the broad question, whether, in Pennsylvania, he be not liable in every event. The common law of England, in every particular in which it is adapted to the habits and circumstances of the people, and is not inconsistent with the political institutions of the country, is the common law of this State; unless where it has been altered by Act of Assembly, by judicial decision, or usage so notorious and general as to enable the judges to take notice of it without pleading or evidence. The same may be said with regard to the construction of those statutes which are held to be in force here. Now on this subject there has been neither Act of Assembly, judicial decision, nor usage; and there is nothing in the circumstances or institutions of the country, which requires a difference. Some of the English judges have thought this privilege of an executor to be an unreasonable advantage, and in the abstract it may be so. But on grounds of policy it will be found to be a wise regulation, and one that is absolutely necessary for the protection of creditors, and all others who are interested in the decedent's estate. What executor who had not sufficient in his hands to indemnify him for his eventual liability for costs, would pursue a doubtful claim, if the experiment were to be made at his own risk? It is true he is bound at his peril to bring suit for all duties owing to the estate of the decedent, except, perhaps, such as are altogether desperate; but that on the other hand would subject him to extraordinary hardship. To creditors, legatees, or distributees, he would be answerable, if he refused to sue for a demand merely, of doubtful validity; and to the defendant he would be mulcted in costs if he

<sup>1</sup> Dunlop Dig., ed. 1849, 795.

<sup>4</sup> Pamph. L. 432; Dunlop Dig., ed.

<sup>2</sup> Pamph. L. 303; Dunlop Dig., ed. 1849, 979; Maule v. Shaffer, 2 Barr 404. 1849, 1064.

<sup>5</sup> See § 5, Act of 1772; 1 Sm. Laws

<sup>6</sup> Act 16th June 1836, § 8; Pamph. 383.

L. 763; Dunlop Dig., ed. 1849, 810.

<sup>6</sup> Musser v. Good, 11 S. & R. 249.

did sue and failed. It might be a question, under such circumstances, whether there would not be more hardship in compelling him to pay, than in refusing to permit the defendant to receive. To me it seems there is more equality and consequently more equity, in leaving each party to pay his own costs; and this is exactly the rule of the English law. At common law there were no costs expressly by name, but the plaintiff, where he failed, was punished in amercement *pro falso clamore*, and the defendant, where the judgment was against him *in misericordia cum expensis litis*, for his unjust detention of the plaintiff's right: and this was the foundation of the statutes which afterwards gave costs by name: so that costs in their origin were rather a punishment of the party paying, than a recompense to the party receiving them. It would therefore seem an equitable and just construction of those statutes, not to impose costs on an executor, except where some fault is personally imputable to him." This must be regarded as the settled law of this State.<sup>1</sup> A defendant administrator who has unsuccessfully resisted a claim against the estate, and has had a general judgment against him, is not personally liable for the costs, and there does not appear to be any essential difference in this regard between an unsuccessful prosecution and an unsuccessful resistance of a claim.<sup>2</sup>

The committee of a lunatic, in whose name suit was brought, is *prima facie* liable for costs.<sup>3</sup>

An infant defendant is liable for costs, although a guardian have been appointed.<sup>4</sup> In an action by an infant, if the defendant be entitled to costs, he may proceed for them by attachment against the *prochein amy* or guardian,<sup>5</sup> or it seems he may sue out execution, even a *ca. sa.* against the infant himself, whether he have sued by *prochein amy* or not.<sup>6</sup> But execution for the costs cannot be issued against a guardian, on a judgment for the defendant, in a suit brought in the minor's name by the guardian. The remedy is by attachment.<sup>7</sup>

The guardian of a minor, in certain cases, may appeal from the judgment of a justice or from an award of arbitrators, without making the usual affidavit and without giving security or paying costs.<sup>8</sup>

<sup>1</sup> Gebhart v. Shindle, 15 S. & R. 239; Muntorf v. Muntorf, 2 Rawle 180; Penrose v. Pawling, 8 W. & S. 380; Myers v. Barton, 5 P. L. J. 142; Furnis v. Ewing, 505, 5 P. L. J., per Lewis, J.

<sup>2</sup> Callender v. Keystone Ins. Co., 11 Harris 472. The case of Ewing v. Furnis, 1 Harris 531, in which it was held that an administrator who fails in a suit instituted by himself is personally liable for the costs, is now overruled. See Callender v. Keystone Ins. Co., 11 Harris 472, opinion per Lowrie, J. It is also stated in the report of Ewing v.

Furnis, that Mr. Justice Lewis filed an elaborate opinion, in which he maintained the doctrines of Musser v. Good. The case reported in 5 P. L. J. 505, also contains an elaborate discussion of the question by Lewis, J., sitting as president judge at Lancaster.

<sup>3</sup> Utt v. Long, 6 W. & S. 177.

<sup>4</sup> 2 Str. 1217; Dy. 104.

<sup>5</sup> 1 Str. 548; Barnes 128.

<sup>6</sup> 2 Str. 1217; 13 East 6.

<sup>7</sup> Bigger v. Westby, 13 S. & R. 347.

<sup>8</sup> Act of 27th March 1833; Pumph. L. 99; Dunlop Dig., ed. 1849, 566; Purd. Dig. 67.

## SECTION VII.

OF DOUBLE AND TREBLE COSTS.<sup>1</sup>

Where the plaintiff recovers single damages, he is only entitled to single costs, unless more be expressly given him by statute; but if double or treble damages are given by statute, the plaintiff is, in England, entitled to double or treble costs, although the statute contains no express direction to that effect.<sup>2</sup> The Statute of Gloucester allowed only single costs, but double costs have since in some cases been given expressly by Act of Assembly. They are allowed to the avowant in replevin, as we have already seen,<sup>3</sup> but not upon an appeal by the plaintiff from an award of arbitrators in favor of the avowant. He can claim them only after final judgment;<sup>4</sup> and treble costs are awarded to the defendants in writs of replevin issued for any owners of goods taken in execution or by distress, by any sheriff, constable, &c., under the authority of the State; an action against any overseer of the poor or other person acting for him in his office, who fails in such action, discontinues or becomes nonsuit, is liable to double costs.<sup>5</sup> In an action against a justice of the peace under the Act of 1772, § 6,<sup>6</sup> if the plaintiff obtains a verdict, and the justices certify on the back of the record, in open court, that the injury for which it was brought was wilfully and maliciously committed, he shall have double costs. Double costs is a relative term, and it has been settled that the plaintiff shall not recover double costs in the Supreme Court, when, in the court below, he could not be entitled to recover any.<sup>7</sup> By the Act of 1772, § 2,<sup>8</sup> the plaintiff in a special action on the case for any pound breach or rescous of goods distrained, shall recover his treble damages and costs of suit against the offender, or the owner of the goods distrained, in case they be afterwards found to have come to his possession;<sup>9</sup> and double damages are expressly given to any person imprisoned or prosecuted without probable cause, to be recovered by action at common law against the informer or prosecutor.<sup>10</sup> So treble costs are allowed to the defendant in any action for acts done in pursuance of the Militia Law of April 2d 1822, where the jury acquit him, or the plaintiff is nonsuited or discontinues, &c. Double costs or charges are also given to any person sued by a retailer of liquors, for liquors or other expenses above 20s.; provided that the plaintiff, if the defendant be a servant, has been warned not to entertain him.<sup>11</sup> Also against plaintiffs who fail in actions against overseers of the poor.<sup>12</sup>

<sup>1</sup> See preceding section.<sup>2</sup> Carth. 297; Ld. Raym. 19; s. c. Salk. 205, pl. 2; and see 14 Johns. 328.<sup>3</sup> *Ante* 753.<sup>4</sup> Hartley v. Bean, 1 Miles 168.<sup>5</sup> Act of March 1771, § 33; 1 Sm. Laws 345; Purd. Dig. 187.<sup>6</sup> 1 Sm. Laws 365; Purd. Dig. 187.<sup>7</sup> Scott v. McKisson, 2 Dallas 184.<sup>8</sup> 1 Sm. Laws 370.<sup>9</sup> *Vide* sect. 3; *Ibid*.<sup>10</sup> Act of 1705; 1 Sm. Laws 56.<sup>11</sup> Sect. 5, Act of 26th August 1721;

1 Sm. Laws 126.

<sup>12</sup> Purd. Dig. 801, § 50; Pamph. L. 1835, p. 109.

Wherever, in England, a plaintiff is entitled to double or treble costs, the costs given by the court *de incremento*, are to be doubled or trebled, as well as those given by the jury.<sup>1</sup> According to the English practice (which seems to rest entirely on the table of costs *in principio*, and of which we know nothing here but the name), double or treble costs are not understood to mean twice or thrice the amount of single costs according to their literal import, but double costs consist of the single costs, and half of the single costs; and treble costs, of the single costs, half of the single costs, and half of that half.<sup>2</sup> In this State, it has been held that where an Act of Assembly gives treble costs, the English rule does not prevail, but the party is allowed three times the usual costs, with the exception that the fees of the officers are not to be trebled, where they are not regularly and usually payable by the defendant.<sup>3</sup>

## SECTION VIII.

### OF THE TAXATION AND RECOVERY OF COSTS.

The taxation of costs is a proceeding whereby the fees, disbursements, and expenses which the prevailing party is entitled to recover against his adversary, are settled and ascertained by a judge or other proper officer. Costs with us are uniformly taxed by the prothonotary, from whose taxation, however, an appeal may be had to the court.

After the final determination of a cause, the party entitled to costs files with the prothonotary a written specification of the fees and expenses which the law requires his adversary to pay; such as the witnesses' fees and mileage, daily pay, price of the *subpoenas* and service, the charges of commissioners for examining his witnesses out of the State, &c. This is called the plaintiff's or defendant's bill, and is inserted in the bill of costs taxed by the prothonotary. If objected to, it is taxed before the prothonotary upon notice to, or by agreement of the opposite party. Costs are sometimes ordered to be retained, by the prothonotary or sheriff, from a party, until the bill is taxed. In such cases, it is usual for the party claiming them to fix the time of taxation and notify his opponent. In other cases, the objecting party usually urges the taxation.

It is provided by rule, in the Court of Common Pleas of Philadelphia, and in the District Court for the City and County of Philadelphia, that any party intending to tax costs before the prothonotary, shall give him and the opposite party twenty-four hours' notice of such intention. The time to be fixed for such taxation shall be from two to three o'clock, P. M.

And in the District Court of Philadelphia, it is held to be the practice in that court, that an execution for costs may be issued without a previous taxation.<sup>4</sup>

<sup>1</sup> Cro. Eliz. 582, *ca.* 6; Carth. 294, *Welsh v. Anthony*, 4 Harris 256.

321; Str. 1048.

<sup>4</sup> *Hart v. Dickerson*, D. C. C. P.,

<sup>2</sup> 2 Arch. Pr. 1161; Hull. 483-4.

Sept. 16th 1848; Bright. Sup., 1849.

<sup>3</sup> *Shoemaker v. Nesbit*, 2 Rawle 201; 152. It is thought proper to add here

The amount of costs which may be demanded by the attorney and officers of the court depends on the services that have been rendered; and the rate of compensation for those services is fixed by various acts, particularly by the Act of 22d February 1821,<sup>1</sup> denominated the fee-bill.<sup>2</sup> It is not intended to extract the particular provisions of the several acts relative to the rate of costs in all specified cases,

the opinion of the court in full on this important point of practice, as the decision above quoted militates with the expression of opinion of the Supreme Court, in 5 Watts 449. *Per curiam*. "This is a *fi. fa.* by defendant for costs, and the ground set up for setting it aside is, that it was issued without taxation or notice to plaintiff. The case of *Richardson v. Cassidy*, 5 Watts 449, is relied on as authority for the position that this is an irregularity. That case only decides, that the plaintiff's bill filed is not evidence in an action of assumpsit brought to recover the costs which had not been taxed. It is true that the court speak of the practice of issuing execution without taxation as a gross irregularity. That, however, is an extra-judicial *dictum*, and at all events, as it is a mere question of practice, can have no binding effect upon us. The practice of every court is within its own power, and not subject to review. The practice of this court to issue executions without a previous taxation of costs, is of very long standing, and we are not disposed to alter it. The right of the party against whom the writ has issued, to have the costs taxed upon very short notice to his opponent, effectually secures him against wrong, while at the same time, in a large majority of cases, as the amount of the costs is not disputed, an unnecessary form, accompanied with trouble and delay, is dispensed with. It would often happen that a defendant apprised by the plaintiff's notice of taxation, that an execution was about to issue, would seek to avoid it, either by removing or disposing of his goods, or delay it by an appeal from the taxation. Costs, in this state, have always been a very different affair from what they are in England. There is scarcely ever any dispute, except as to the mere costs of evidence, depositions, commissions, and witnesses. The administration of justice, too, in Pennsylvania, is cheap to the parties. The legal costs of the heaviest trials form, generally, a very small percentage upon the sum in controversy." Rule dismissed.

<sup>1</sup> 7 Sm. Laws 367, Dunlop Dig., ed.

1849, 362.

<sup>2</sup> "One main object of this law was to cut up by the roots the power which had been exercised by the courts, of allowing fees called *compensatory*, for services not specified in the several fee-bills. It is true that, in the last part of the 26th section of the Act of 1814, still in force, the judges were prohibited to allow compensatory fees for any services not specified in that act, or *some other Act of Assembly*, but the words, *some other Act of Assembly*, seem intended to relate to acts which might afterwards be made." *Kline v. Shannon*, 7 S. & R. 378.

"It falls to the lot of almost every man to require the services of public officers. It is of very great importance, therefore, that every man should know what he has to pay; for if it is left to the parties to agree upon the compensation, a door is opened for perpetual litigation, and there is great danger of oppression to the lower and more ignorant people. It is for this reason that a table of fees has been established, which every officer is enjoined to exhibit to public view in his office. It is impossible for human wisdom to foresee every service which will arise. This must have been known to the legislature, and, therefore, in framing the table, they have taken care to allow, what on the whole will render officers sufficiently lucrative, although, for many services, there may be no compensation at all. In the sheriff's office, the commission on executions is the principal source of profit. It may happen that many hundred dollars may be earned in a few hours. If all services were paid for on the same scale, the burden on suitors would be intolerable. But that not being the case, the officer may be supposed, on the whole, to receive a reasonable payment for each service, although for many he receives nothing. It appears to me, therefore, that the fee-bill was intended to enumerate all the services for which the officer should be entitled to receive pay." *Per TILGHMAN, C. J.*: *Irwin v. Commissioners of Northumberland County*, 1 S. & R. 506-7.

since, in order to render the subject fully intelligible, it would be necessary to exhibit forms of bills of costs in a great variety of cases. Some few, however, of these provisions, it may be proper to notice.

In the 5th section of the Act of 21st March 1806,<sup>1</sup> there is a provision that the plaintiff's attorney shall not be entitled to a judgment-fee, in any action of debt, whether judgment be confessed by the defendant, or rendered on the report of referees, or on the verdict of a jury. This provision, if it do away the judgment-fee in an action of debt prosecuted by an attorney,<sup>2</sup> is to be confined to the technical *action of debt*, and cannot be extended to any other form of suit.<sup>3</sup> And it was held not to deprive the attorney in such action of his fee, where the suit was ended, on discontinuance by the plaintiff, and payment of costs by the defendant, after the first term, and before judgment.<sup>4</sup>

And by the 26th section of the Act of 1814, which constituted a prior fee-bill, if any officer shall take greater or other fees than are specified in the fee-bill, or shall charge or demand and take any of the fees ascertained in it, where the business for which such fees are chargeable shall not have been actually done, or shall charge or demand any fee for any services other than those expressly provided for by the fee-bill, such officer shall forfeit and pay to the party injured, fifty dollars, to be recovered as debts of the same amount are recoverable; and if the judges shall allow any officer any fees under the denominations of compensatory fees, for any services not specified in this or some other Act of Assembly, it shall be considered a misdemeanor in office. By the 27th section, payment of fees may be refused to any officer who will not make out a bill of particulars, as prescribed by the fee-bill, signed by him, if required, and also a receipt, signed by him, of the fees paid. The fee-bill of 1821 continues these sections in force, and limits actions upon them to six months after the cause of action has accrued.

By the Act of 11th April 1825,<sup>5</sup> it is provided, "That in suits on the same instrument, bond, or note, where several are bound; and in suits against the maker, endorser or endorsers, of any note; and in suits on any bill of exchange against the drawer, acceptor, or any endorser or endorsers thereof, there shall be a taxation and recovery of the attorney and counsel fees, taxable by law, in one of the said suits only, at the election of the party plaintiff, and no fees for attorney or counsel shall be allowed or taxed, in any suit or suits brought on the same instrument, bond, note, or bill of exchange, against the party or parties thereto, other than in one where the election is made as aforesaid."

This proviso being intended to prevent the multiplication of suits, is applicable to the plaintiff's attorney's fees only, and does not extend to the fees of the several defendants' attorneys, who, having no control in bringing the suits, are not deprived of their fees.<sup>6</sup>

<sup>1</sup> 4 Sm. Laws 328; Dunlop Dig., ed. 1849, 240.

<sup>2</sup> Del. Ins. Co. v. Gilpin, 1 Binn. 501.

<sup>3</sup> 2 Browne Appx. 24.

<sup>4</sup> Del. Ins. Co. v. Gilpin, 1 Binn. 501.

<sup>5</sup> Pamph. L. 225.

<sup>6</sup> Columbia Bank v. Haldeman, 5 P. L. J. 23.

An attorney's fee of three dollars is due upon an award of arbitrators, under the Compulsory Arbitration Law.<sup>1</sup>

The Act of 6th May 1844, § 8,<sup>2</sup> provides, that no attorney or judgment fees shall be allowed or taxed on the entry of any judgment by confession, in any court in this commonwealth, where suit has not been previously commenced, and where the amount of said judgment shall not exceed the sum of one hundred dollars.

Where three members of the bar entered their appearance for a defendant, having been employed generally by him, but no warrant of attorney was given to either, it was *held* that the attorney's fee was equally to be divided between them; though it was said that if the one first employed had received a warrant of attorney, he would have been exclusively entitled to the fee.<sup>3</sup>

No fees for witnesses can be taxed when the bill is disputed, without proof upon oath of the witness or some competent person acquainted with the facts of their attendance and travel.

On the taxation of costs, the plaintiff is competent to prove that he subpoenaed the witnesses, but not the fact of their attendance.<sup>4</sup> But it is not necessary that witnesses should attend before the prothonotary on the taxation of costs, to prove their attendance on the trial of the cause. The fact may be proved *aliunde*.<sup>5</sup>

In the taxation of witnesses' fees, the party is entitled to payment of fees for witnesses who have attended in good faith upon the trial at his instance, whether they have been subpoenaed or examined or not.<sup>6</sup> No general rule can be laid down as to the number or materiality of the witnesses for whom costs will be taxed, with safety to the suitors and the general practice—a party must come armed at all points, not knowing what will be conceded by his adversary or what all his witnesses will testify: upon such questions manifest oppression must be shown to justify the interposition of the court, and they will readily interfere in such instances; but a design to oppress will never be presumed.<sup>7</sup> But a plaintiff can recover no more from the defendant for the fees of witnesses than he is liable to pay them himself. Therefore, where there are several actions depending, by the same plaintiff against different defendants, and the parties agree that the verdict and judgment in one case shall govern all, and the same witnesses are subpoenaed for each suit, the plaintiff is not entitled to recover from each defendant costs for the attendance of each witness.<sup>8</sup> Members of the bar are not entitled to witness-fees for attendance in a court in, which they actually practise.<sup>9</sup> To entitle a party to the costs of his witnesses and of the service of *subpœnas* upon them, it is not necessary that their names should have been inserted in the *subpœnas* by the prothonotary, before delivering them to the party.<sup>10</sup> Witnesses who attended

<sup>1</sup> Butcher v. Scott, 2 P. L. J. 287.

<sup>2</sup> Pamph. L. 564; Dunlop Dig., ed. 1849, 1028.

<sup>3</sup> Hirst v. Dumell, 1 Wash. C. C. R. 438.

<sup>4</sup> Stokes v. Derringer, D. C. C. P., Oct. 2d 1847.

<sup>5</sup> McWilliams v. Hopkins, 1 Wh. 276.

<sup>6</sup> Ibid.; De Benneville v. De Benneville, 1 Binn. 47.

<sup>7</sup> De Benneville v. De Benneville, 3 Yeates 558.

<sup>8</sup> Curtis v. Buzzard, 15 S. & R. 21.

<sup>9</sup> McWilliams v. Hopkins, 1 Wh. 276.

<sup>10</sup> Ibid.

before the prothonotary on the taxation of costs, to prove their attendance at the trial, are not entitled to fees for such attendance before the prothonotary.<sup>1</sup>

The charges for attendance of the witnesses before a commissioner, and the reasonable charges of the latter for swearing the witnesses and reducing their testimony to writing, are chargeable as costs against the party condemned in the action.<sup>2</sup>

A defendant, succeeding in several cases tried at the same term by several plaintiffs, cannot recover more than one *per diem* allowance and mileage of a witness who was subpoenaed in each case; but he may select any one of the plaintiffs to recover it from. If he has several witnesses, he may select of the plaintiffs, and recover part of the bill of costs of one, and part from another. He may, however, recover from each the service of *subpoenas* on the same witnesses in each case, but he can recover mileage in *one* case only. As to his own daily pay, if the attendance be on appeals from awards, he is entitled to it fully in each of such cases.<sup>3</sup>

In a controversy arising out of one and the same transaction between several and different plaintiffs, but the same defendant, who alone is liable for costs, a witness who is subpoenaed in the several suits by the respective plaintiffs, is entitled to single pay for each day's attendance, and no more, without regard to the number of suits in which he is called to testify.<sup>4</sup>

And where an individual appears in the double light of a witness for the prosecution in one cause, and for the defence in another cause, which are tried together, he is entitled to but one compensation, and must elect to whom he will recur for payment; and having so done, he is bound by his election.<sup>5</sup>

A witness residing in another State is not entitled to be paid his expenses in coming to the place of trial in Pennsylvania; he is entitled to mileage according to the fee-bill only from the line of this State, in the usual and ordinary route of travelling.<sup>6</sup>

Where the cause is made a *remanet*, that is, remains on the list untried for want of time, the costs incurred in bringing up witnesses, &c., are allowed to the party ultimately prevailing; and the same where a cause goes off upon any other occasion, without the fault or contrivance of the parties, and is afterwards brought to trial.<sup>7</sup>

A party is not entitled to an allowance in his bill of costs for the expense of office copies of deeds and other documents produced on the trial in support of his title.<sup>8</sup> The expenses of exemplifications of office papers were disallowed on taxation, where the papers were rejected on the trial.<sup>9</sup>

And the expenses attending a survey of the land in question are not taxable in the costs of an action of ejectment.<sup>10</sup> Neither are the

<sup>1</sup> McWilliams v. Hopkins, 1 Wh. 276.

<sup>6</sup> Leeds v. Loud, 2 Miles 189.

<sup>2</sup> Tappan v. Columbia Bank and Bridge Co., 4 P. L. J. 224.

<sup>7</sup> 5 Burr. 2693; see Work v. Lessee of Maclay, 14 S. & R. 265.

<sup>3</sup> Horner v. Harrington, 6 Watts 331.

<sup>8</sup> Murphy v. Lloyd, 3 Wh. 356.

<sup>4</sup> Batdorff v. Eckert, 3 Barr 267.

<sup>9</sup> Leeds v. Loud, 2 Miles 189.

<sup>5</sup> Commonwealth v. Cozens, 1 Ash. 265.

<sup>10</sup> 15 Johns. 238.



costs of a bill to perpetuate testimony, although such testimony were used against the defendant.<sup>1</sup>

The District Court refused to allow costs to a defendant for his answer to a bill of discovery.<sup>2</sup> And in a *scire facias* in foreign attachment the garnishees were held not to be entitled, upon judgment rendered for them, to the costs of an exemplification of an assignment which was produced by them on trial to prove their case.<sup>3</sup>

An appeal lies to the court by either party dissatisfied with the taxation, by motion and notice, as in ordinary cases, which, being placed in its order upon the argument-list, is heard at the period fixed for determining questions of law; and the court will either correct the bill as to the erroneous items, refer the whole for re-taxation, or dismiss the appeal, as the circumstances of the case may require.

Where the plaintiff has levied, by execution, costs to which he is not entitled, the court will compel him, by rule, to refund them, even after they have been distributed by the sheriff.<sup>4</sup>

At common law, error could not be assigned on a bill of costs. In England, where the terms of the judgment are set out at large, a gross sum is adjudged for the costs; and a court of error cannot inquire into the constituent parts, because these cannot judicially be made to appear. Here, however, a different practice, long recognised, has made the costs so far a matter of record, as to enable the court to judge whether the constituent parts of the bill are such as the law allows. With us the judgment is never reduced to form, but signed in blank; so that where parts of the costs are objectionable, the remedy is not a reversal of the judgment *pro tanto*, unless there has been a special award of execution for those costs, but the execution is reversed so far as respects the objectionable matter, as having issued without a correspondent judgment to warrant it.<sup>5</sup>

The method of recovering costs between party and party, is by execution, or by attachment, which last is the only mode of recovering costs on an interlocutory rule or order, unless there has been an express promise to pay them.<sup>6</sup> If, under the former process, costs are levied, to which the party is not entitled, the court will compel him by rule to refund them even after they had been distributed by the sheriff.<sup>7</sup> Attachment for costs is rarely resorted to in Pennsylvania.

It would seem that the right of the State courts to compel payment of costs by attachment, is not impaired by the first section of the Act of April 1809.<sup>8</sup> They may make orders for payment of costs, and enforce their orders by attachment.<sup>9</sup> In proceeding by attachment a rule is first obtained upon the party to pay the costs,

<sup>1</sup> *McWilliams v. Hopkins*, 1 Wh. 276. *Nelson*, 5 S. & R. 234.

<sup>2</sup> *Tenor v. Hutton*, D. C. C. P., 7 Leg. Int. 50.

<sup>3</sup> *Christmas v. Biddle*, Ibid. 66.

<sup>4</sup> *Harris v. Fortune*, 1 Binn. 125.

<sup>5</sup> *Barnet v. Ihrie*, 2 Rawle 53.

<sup>6</sup> See 2 Duml. Pr. 740; *Fraley v.*

<sup>7</sup> *Harris v. Fortune*, 1 Binn. 125.

<sup>8</sup> 5 Sm. Laws 55; *Terry v. Peterson*, D. C. Phila.; 1 Wh. Dig. 139-140.

<sup>9</sup> *Fraley v. Nelson*, 5 S. & R. 234;

*Lyon v. McManus*, 4 Binn. 171.

which must be served personally upon him ; a non-compliance with this rule amounts to a contempt, and comes within the spirit of the exceptions in the act. If the costs be not paid, the court, upon an affidavit of the circumstances, will grant an attachment, the rule for which is absolute in the first instance.<sup>1</sup>

Rules for payment of costs on judgments, are acts of the court which cannot be entered in vacation, but must be granted on motion in open court. In the court, and not in the party, is vested the power of fixing the time for payment of costs, under the penalty of judgment in case default be made.<sup>2</sup> The party on whom the rule is granted, is of course, entitled to reasonable notice.<sup>3</sup>

To assist the parties in the recovery of costs, and to do justice between them, they are allowed to deduct, or set off the costs, or debt and costs, in one action, against those in another,<sup>4</sup> although the body of the defendant has been taken in execution, on the judgment which is offered as a set-off.<sup>5</sup> "Judgments are set against each other not by force of statutes, but by the inherent power of the courts immemorially exercised, being almost the only equitable jurisdiction originally appertaining to them as courts of law. An equitable right of setting off judgments, therefore, is permitted only where it will infringe on no other right of equal grade ; consequently, it is not to affect an equitable assignee for value."<sup>6</sup> Not being conferred by statute, it is not a legal power, nor is its exercise demandable of right. Being discretionary, it is not the subject of a writ of error.<sup>7</sup>

In the English practice, where an application is made to set off costs and damages in one action against those recovered in a cross-action, an attorney has a lien on the judgment obtained by his client against the opposite party, to the extent of his costs of that cause, and that only.<sup>8</sup> A judgment for costs obtained against an administrator plaintiff in one court, and assigned by the defendant to A., cannot be set off against a judgment for damages obtained by such administrator against A. in another court.<sup>9</sup>

The setting off of one judgment against another has always been permitted, but they must be both in the *same right*.<sup>10</sup> So, of a judgment against a demand not ascertained by judgment.<sup>11</sup> Where the application is made by the party to whom the larger sum is due, the rule is for a stay of proceedings, on acknowledging satisfaction for a less sum ;<sup>12</sup> but where the less sum is due to the party applying, the rule is to have it deducted, and for a stay of proceedings on payment of the balance.<sup>13</sup>

One who is an active party in having a suit brought on, although his name does not appear upon the record, is liable to the witnesses for the plaintiff without an express promise to pay ; and a witness

<sup>1</sup> See 2 Dunl. Pr. 740.

<sup>2</sup> Devinny v. Reeder, 1 Pa. R. 400.

<sup>3</sup> Ibid.

<sup>4</sup> 1 H. Bl. 217.

<sup>5</sup> 1 M. & S. 696.

<sup>6</sup> Ramsey's Appeal, 2 Watts 230.

<sup>7</sup> Burns v. Thornbaugh, 3 Ibid. 78.

<sup>8</sup> 3 Barn. & Cress. 535.

<sup>9</sup> McWilliams v. Hopkins, 1 Wh. 275.

<sup>10</sup> Vide Dunkin v. Galbraith, 1 Browne 48 ; Hazlehurst v. Bayard, 3 Yeates 152.

<sup>11</sup> Metzgar v. Metzgar, 1 Rawle 227.

<sup>12</sup> Bull. N. P. 336 ; 1 Taunt. 426.

<sup>13</sup> 4 T. R. 124.

may maintain an action against the party who has subpoenaed him and who has lost the cause, for his daily pay and expenses, without a previous demand of taxation of costs.<sup>1</sup>

The plaintiff in every civil action is eventually liable to the officers of the court for the fees prescribed by law, in case they cannot be procured from the defendant; for in the contemplation of the law, he is supposed to have paid them as the action proceeded.<sup>2</sup> Hence it is, that the award of execution is for all the costs to the plaintiff, "by him about his suit in that behalf expended."<sup>3</sup> The general practice, both before and since the Revolution, has been for the prothonotary to receive immediate payment for original writs, writs of removal, *subpoenas*, searches by the parties, copies of papers in the cause, and rules of court. But for other services, such as the entry of oyer and special imparlances, filing declarations, entries of pleas, and the like, the costs have been considered as abiding the event of the action.<sup>4</sup> So, that an action does not lie by the prothonotary to recover his fees in a cause which is still depending.<sup>5</sup> But, at the termination of the suit, he may recover them in an action in his own name, or he may include them in the execution issued by the successful party, as if they were a part of the latter's costs; and that where such party has himself nothing to receive; as in an execution against an executor on a discontinuance, who is liable to the officers for their fees for services rendered.<sup>6</sup>

Fees paid at the time of the services are necessarily taxed to the party as costs; but when not advanced, they are never included in his bill, but are endorsed on the execution as appertaining to the respective officers, and are collected by the sheriff to their use, and by him accounted for in his periodical settlements with them. Until their receipt by him, the party ordering the services is liable, but after that he is discharged, though the money be lost in the sheriff's hands. It is then the business of each officer to make him pay over his fees.<sup>7</sup>

The officers' fees are part of the plaintiff's costs, which he is supposed to have paid to them, and which he collects ostensibly for himself, but actually for them, by his execution. This has been the practice from the foundation of the State. Though the legal title to them is in the plaintiff, it is only as a trustee; and the officers may, consequently, sue out an execution for them in his own name.<sup>8</sup>

The prothonotary may maintain a suit for his fees against the party for whom the services are done, in the same manner as for other debts, and where the amount does not exceed one hundred dollars, he may sue before a magistrate. The fees are not chargeable to the attorney of the party for whom the services are done, unless he has become security for the costs.<sup>9</sup>

<sup>1</sup> *Utt v. Long*, 6 W. & S. 174.

<sup>2</sup> *Commonwealth v. County Commissioners*, 8 S. & R. 153; *Lyon v. McManus*, 4 Binn. 172; *Musser v. Good*, 11 S. & R. 248; *Banks v. Juniata Bank*, 16 *Ibid* 155; see also 1 *Peters's Rep.* 223.

<sup>3</sup> *Commonwealth v. County Commissioners*, 8 S. & R. 153.

<sup>4</sup> *Lyon v. McManus*, 4 Binn. 172.

<sup>5</sup> *Ibid*. 167.

<sup>6</sup> *Musser v. Good*, 11 S. & R. 248.

<sup>7</sup> *Beale v. The Commonwealth*, 7 *Watts* 186.

<sup>8</sup> *Ranch v. Hill*, 3 *Barr* 423; see, however, *Moore v. Porter*, 13 S. & R. 100.

<sup>9</sup> *Moore v. Porter*, 13 S. & R. 100.

## CHAPTER XXIII.

### OF EXECUTION.

#### SECTION I. OF THE NATURE, FORM, AND PROPERTIES OF EXECUTIONS GENERALLY. P. 776.

##### 1. *Nature of Execution.* P. 776.

When execution is allowable.  
Matters subsequent to the judgment.  
A change of parties.  
Marriage.  
Bankruptcy  
Death.  
Purchase of judgment by third party.  
By what court execution is granted.

##### 2. *Of the different kinds of Execution, the Object to which each is applicable, and the Order in which they may issue; and herein of Contemporaneous and Successive Writs.* P. 781.

Fieri facias.  
Levari facias.  
Venditioni exponas.  
Capias ad satisfaciendum.  
Attachment execution.  
Mandamus execution.  
Sequestration.  
Testatum execution.  
Order in which executions may issue.  
Of contemporaneous writs.  
Of successive writs. Alias.

##### 3. *What Property is liable to Execution; and herein of Exemption from Execution, and of the Widow's Claim.* P. 786.

Personal estate.  
Stock.  
Coin and bank notes.  
Chattels pawned, &c.  
Goods of a stranger to the writ.  
Of sales by defendant fraudulent in law.  
Collusive sheriff's sales of defendant's  
goods.  
Actual fraud.  
Sale after notice of execution.  
Goods purchased by defendant but not  
delivered.  
Confusion of goods.  
Goods belonging to defendant's wife.  
Goods of defendant's son.  
Partnership goods.

Chattels of a corporation.

Choses in action.

Fixtures.

Growing crops.

Chattels real.

Real property.

Fraudulent conveyances by defendant

Estate of a married woman.

After-acquired lands.

Restricted judgment.

Lands of decedent.

Land aliened after the judgment.

Life estate.

Of exemption from execution.

The Act of 1836.

The Act of 1846.

Militia.

The Act of 9th April 1849.

To what it applies.

Debts contracted prior to the act.

What property is within the act.

Value and kind of property exempted.

Where the defendant is allowed to take  
money.

Where property has been once exempted.

The claim of exemption and demand  
of appraisement.

Time of making the claim.

On what writs exemption must be  
claimed.

Appraisement.

The sale of land.

Disregard by the officer of the claim  
for exemption.

Waiver of exemption.

Abandonment of claim.

Effect of waiver.

Privilege not assignable.

Fraud on part of defendant forfeits his  
right.

Of the claim under the Widows' Act.

In what cases the exemption may be  
claimed.

Against what creditors or liens.

Out of what property.

By whom the claim may be made.

Manner and time of making the claim.

Appraisement.

Confirmation.

Appeal.

- Refusal to appraise.  
Waiver.
4. *Of the time within which execution may be had; and herein of the stay of execution, and of the power of the court to control and set aside executions.* P. 82<sup>a</sup>  
Time after which execution may issue  
Time within which execution must issue.  
Death of plaintiff.  
Death of defendant.  
Stay on account of a writ of error or appeal.  
Stay of execution by agreement.  
Stay of execution by statute.  
a. Freeholders.  
Period of stay.  
Practice.  
b. Bail for stay of execution.  
His security for thirty days.  
Bail for the full period.  
Time within which bail must be entered.  
Mode of entering bail.  
Exceptions to bail.  
Effect of entering bail.  
The time of the stay.  
As regards the plaintiff.  
The defendant.  
The surety.  
Discharge of surety.  
Waiver of stay of execution.  
c. Statutory stay in special cases.  
Soldiers.  
Executors and administrators.  
Mechanics' lien.  
Stay prohibited.  
Power of court to control executions.  
Staying and setting aside executions by the court.  
Injunction.
5. *To what Time the Writ relates and what it binds.* P. 849.
6. *By whom Execution is to be sued out.* P. 851.
7. *Against whom Execution may issue.* P. 852.
8. *Of the Officer who executes the Writ, his Duties and Liabilities, and his Compensation.* P. 853.  
Who is to execute it.  
Distringas.  
The authority of the sheriff.  
Liabilities.  
Liability to plaintiff.  
Indemnity.  
Abandonment of levy.  
Refusal to sell.  
Refusal to deliver.  
Not returning writ.  
On return.  
On receipt of money.  
On distribution.  
Liability to defendant.  
Liability to third persons.
- Defences.  
Evidence.  
Measure of damages.  
Of the officer's compensation.  
Expenses.
9. *Of the Form of the Writ, and of the Endorsement; and herein of the Amount for which it may issue.* P. 868.  
The return day.  
Defective and irregular writs.  
Endorsement.  
Amount of the execution.  
In debt on a bond.
10. *Of the Return and its Incidents.* P. 872.  
Form. Amendments.  
Effect.  
As to the officer.  
As to other persons.  
Neglect or misconduct of officer.
11. *Liability of Plaintiff in Execution.* P. 877.
12. *Of Executions void or voidable.* P. 878.  
What executions are void and what merely voidable.  
The effect of void and voidable writs.
13. *Of lost Executions.* P. 880.
14. *Effect of a Reversal of Judgment after Sale.* P. 881.
- SECTION II. EXECUTION AGAINST GOODS AND CHATTELS. P. 881.
- The writ employed.  
Issuing the writ.  
Levy.  
Time.  
Manner of levy.  
Schedule or inventory.  
Effect of levy.  
As regards the debtor.  
As regards other creditors.  
Custody of the goods.  
Consequences of leaving the goods with defendant.  
As relates to the officer.  
As regards the plaintiff.  
Interference of the plaintiff with the process.  
Proceedings where the goods are claimed as the property of a stranger.  
Of indemnity.  
Sheriff's interpleader.  
Rule of the District Court.  
The bond.  
Pleadings.  
Feigned issue.  
Payment by defendant to sheriff.  
The sale and its incidents.  
Manner of sale.  
Who may purchase.

Misconduct of purchaser.  
 Delivery of goods.  
 Payment.  
 Effect of sale.  
 Purchaser's title.  
 Setting aside sale.  
 Return to fieri facias.  
 Time of return.  
 Payment by sheriff.  
 Payment into court.  
 Distribution.  
 Preferred claims.  
 The Widows' claim.  
 The Landlord's claim.  
 Wages.  
 Persons entitled.  
 Practice.  
 Miscellaneous.  
 Conflict of creditors.  
 Distribution among execution-creditors.  
 In case of partnership property.  
 Surplus.  
 Alias fieri facias.  
 Venditioni exponas.

### SECTION III. EXECUTION AGAINST CHOSE IN ACTION. ATTACHMENT-EXECUTION. EXECUTION AGAINST STOCK. P. 936.

Preliminary.  
 Nature of attachment-execution.  
 Where it lies.  
 What may be attached.  
 Debts.  
 Debts equitably assigned.  
 Things pawned, pledged, or demised.  
 Legacies and distributive shares.  
 Wages and salaries.  
 Who may be made garnishee.  
 Effect of attachment.  
 Relations of garnishee with defendant.  
 Sheriff's right to indemnity.  
 Effect as to strangers.  
 Practice.  
 When the writ may issue.  
 Form of the writ.  
 Service upon the defendant.  
 Service upon the garnishee.  
 Appearance and default.  
 The interrogatories.  
 Answers.  
 Pleadings.  
 Defences.  
 Set-off.  
 Trial.  
 Evidence.  
 Witness.  
 Verdict.  
 Judgment.  
 Appeal.  
 Costs.  
 Modes of obtaining satisfaction.  
 Execution against stock.  
 1 Stock held in the name of defendant.  
 2. Where stock belonging to defendant is held in the name of another.

### SECTION IV. EXECUTION AGAINST REAL ESTATE. FIERI FACIAS. P. 975.

Preliminary.  
 Nature and form of the writ.  
 Levy.  
 Setting aside levy.  
 Abandonment of proceedings.  
 Inquisition.  
 When necessary.  
 Dispensed with in some cases.  
 May be waived.  
 When and where held.  
 Proceedings.  
 Return of the inquisition and fi. fa.  
 Approval by court.  
 Proceedings where lands are extended.  
 1. *Liberari Facias.* P. 986.  
 Costs.  
 2. *Retention of the Lands by Defendant.* P. 989.  
 Notices.  
 Where there are several liens on the land.  
 Where judgments are entered subsequently to the extent.  
 Proceedings after condemnation. Venditioni exponas.  
 When the ven. ex. issues.  
 When necessary.  
 Stay.  
 Setting aside.  
 Form of the writ.  
 Who may execute it.  
 Sheriff's sale of land.  
 Time of sale.  
 Notice and advertisements.  
 Manner of sale.  
 Should not be in a lump.  
 Conditions.  
 Notices at the sale.  
 Who may be purchaser.  
 Misconduct on the part of purchaser.  
 Agreements between bidders.  
 Postponing the sale.  
 Effect of sale as notice.  
 Setting aside the sale.  
 Time of application.  
 Grounds for setting aside the sale.  
 Mere inadequacy of price.  
 Misdescription.  
 Mistake.  
 Misconduct.  
 Irregularities in the sale or process.  
 Failure of purchaser to comply with his contract.  
 Return to ven. ex.  
 Alias.  
 Of the sheriff's deed.  
 Of the deed generally.  
 Recitals.  
 Effect of deed as evidence.  
 Lost deeds.  
 Recording deed.  
 Custody of deeds not called for by purchaser.

Acknowledgment.  
 The place where it is to be made.  
 By whom.  
 Defective or informal return, deed, execution, or acknowledgment.  
 Manner and form of acknowledgment.  
 How acknowledgment is proved.  
 Effect of acknowledgment.  
 Opposing the acknowledgment.  
 Acknowledgment when a lien-creditor becomes purchaser.

Of the receipt of the money by the sheriff, and his disposition of it.  
 Of the sheriff's receipt of the money.  
 Interest.

Where a lien-creditor becomes the purchaser.

The rules of the District Court of Philadelphia.

Distribution by sheriff.

Payment of money into court.

Distribution of proceeds by the court.

1. *Effect of the Sale upon Encumbrances.* P. 1037.

Judgments.

Purchase-money.

Ground-rent.

Sheriff's recognisance.

Debts of decedent.

Legacies.

Municipal claims.

Taxes.

Mortgages.

What prior liens will operate to discharge a mortgage.

2. *Of the Right to the Proceeds.* P. 1047.

Claimant must have a lien, and such lien must have been discharged by the sale.

Judgments and mortgages.

Judgments confessed in preference of creditors.

Judgments to secure future advances.

Judgments and mortgages of married women.

Miscellaneous.

Discharge of judgments.

After-acquired land.

Expired judgments.

Assigned judgments.

Set-off.

Subrogation.

3. *The Order of Payment.* P. 1062.

Judgments and mortgages.

Preferred liens.

Taxes and municipal claims.

Wages.

Other preferred claims.

Arrears of ground-rent.

Purchase-money.

Miscellaneous.

Partnership judgments.

4. *Disposition of the Surplus.* P. 1070.

Practice before auditors.

Jurisdiction of court.

Appointment.

Powers at the hearing.

Jurisdiction.

Report.

Compensation.

Costs of audit.

Feigned issue.

Who may apply.

Time of application.

Mode of application.

Grounds for granting the issue.

Form of the issue.

Trial. Evidence. Costs.

Effect of issue.

Error.

Filing the report.

Exceptions.

Decree of distribution.

Effect of decree.

Appeal from decree.

Who may appeal.

Time of appealing.

Manner of taking the appeal.

Grounds.

Effect of appeal upon the distributees.

Of purchasers.

1. *The Purchaser's Title.* P. 1093.

Notice to affect the purchaser.

Record.

Lis pendens.

Actual notice.

Constructive notice.

Effect of irregularities in the judgment or subsequent proceedings.

Sale under a void judgment.

Sale under an expired judgment.

The quantity of land which passes.

Fixtures.

Grain growing.

The estate which passes.

Purchaser's relations with a lessee of defendant.

Encumbrances and liabilities.

Purchaser as trustee.

Time to which the title of purchaser relates.

2. *Proceedings to obtain Possession.* P. 1112.

Notice.

Petition to two justices.

Warrant to the sheriff.

The inquisition.

Record and award.

Damages and costs.

Delivery of possession.

Certiorari.

Proceedings where the terre-tenant disclaims.

Where he names his grantor or lessor.

The recognisances.

The ejectment.

Defences.

By wife who claims in her own right.

By terre-tenant claiming under a conveyance prior to the judgment.

Where terre-tenant alleges the judgment was not a lien on the land.

Where defendant had no notice of the writ.

**SECTION V. EXECUTION AGAINST THE PERSON. CAPIAS AD SATISFACIENDUM. P. 1124.**

Where it lies.

When it issues.

Form.

Service.

Privilege from arrest.

Escape.

The sheriff's liability.

Return.

Proceedings subsequent to the arrest.

Satisfaction by payment.

Satisfaction by discharge.

Satisfaction by death of defendant.

Discharge under the Insolvent Laws.

Discharge under the Bread Act.

Imprisonment.

Effect of an arrest on a ca. sa.

**SECTION VI. OF CERTAIN PECULIAR KINDS OF EXECUTION. P. 1135.**

**1. *Testatum Fieri Facias.* P. 1135.**

The lien of the writ.

Satisfaction.

**2. *Fi. Fa. on a Judgment transferred to another County.* P. 1137.**

**3. *Execution against a Tract lying in two Counties.* P. 1139.**

**4. *Execution upon Judgments whose Lien is restricted to a particular Tract. Levam Facias.* P. 1141.**

Levavi facias.

Form of the writ.

When it issues.

What may be levied on.

Sale.

In what order.

To whom.

Failure to sell. Alias liberari.

Sheriff's deed.

Purchaser's title.

Distribution of proceeds.

**5. *Of compelling Contribution against joint Defendants.* P. 1145.**

**6. *Bill of Discovery in aid of Execution.* P. 1146.**

Jurisdiction.

Where it lies.

Against whom.

Form.

Scire facias.

Service.

Execution.

**7. *Execution against Life Estate.* P. 1150. Sequestration.**

**8. *Execution against Corporations.* P. 1152.**

I. Private corporations.

In case there is property.

How executed.

Proceedings for discovery of effects.

Where no property can be found. Sequestration.

Where sequestration lies.

Against what.

The form of the writ.

The sequesterator.

Powers and duties.

Payment of debts.

Control exercised by the court.

In case of a public work.

Object of proceeding.

**II. Municipal corporations. Mandamus. Execution. P. 1158.**

Where it lies.

Against what.

The form.

Effect.

**SECTION I.**

**OF THE NATURE, FORM, AND PROPERTIES OF EXECUTIONS GENERALLY.**

**1. *Nature of Execution.***

If the regular judgment of the court, after the decision of the suit, be not suspended or reversed by some one of the methods above mentioned, the next and last step is the *execution* of that judgment, or putting the sentence of the law in force. Execution in civil actions is the mode of obtaining the debt, or damages, or other thing recovered by the judgment.<sup>1</sup> The process of execution is a judicial writ issuing out of the court where the record is on which it is grounded.<sup>2</sup> Writs of execution are directed to the sheriff, coroner,

<sup>1</sup> Tidd 993.

<sup>2</sup> Ibid. 994.



or other ministerial officer of the court, and command him either that of the goods or of the lands of the defendant he *cause to be made* the amount of money required, or that of the lands of the defendant he *cause to be levied* such amount, or that he attach the *choses in action* of the defendant, or that he *take* the defendant in *satisfaction*.

A party suing out an execution, and enforcing a judgment in his favor, elects to take it as rendered, and cannot afterwards prosecute a writ of error thereto.<sup>1</sup>

*When execution is allowable.*—As the execution is grounded upon a judgment, it cannot issue till a judgment has been actually entered.<sup>2</sup> And the judgment must be final, for, in general, execution cannot issue on an interlocutory judgment.<sup>3</sup> And so no execution issues upon the determination of a feigned issue, which is merely a method of ascertaining a disputed fact.<sup>4</sup> But the entering *judgment* in the docket, without mentioning the sum, is a very usual practice, and is sufficient, in the case of judgments by confession, whenever the plaintiff's demand is in the nature of a debt, which may be ascertained by calculation; the judgment is supposed to be for the amount of damages laid in the declaration, and the execution issues accordingly; but the plaintiff endorses on the execution the amount of the actual debt, and in case of injustice the court will relieve the defendant on motion.<sup>5</sup> And in an action of *debt*, a general judgment by default against defendant, without liquidation of damages by writ of inquiry, will sustain an execution, the real debt being endorsed on the writ.<sup>6</sup> The entry upon the record of the confirmation of a report and award of viewers under the General Railroad Act of 19th February 1849,<sup>7</sup> is an entry of judgment sufficient to meet the requisitions of that act, and will sustain an execution.<sup>8</sup> The report of county auditors, when filed, has the effect of a judgment,<sup>9</sup> and if no appeal is taken, or if the appeal is decided in favor of the commonwealth or county, execution may issue as in other cases.<sup>10</sup> In the case of voluntary arbitration, where the submission was made a rule of court, judgment must be entered on the award before execution can issue.<sup>11</sup> But when the report has been read to the court, and a judgment entered *nisi*, if no exceptions are filed, it has been a pretty uniform practice to issue execution without entering a second judgment absolute.<sup>12</sup> Under the Compulsory Arbitration Act the award has the effect of a judgment unless appealed from.<sup>13</sup> But a *confession of an award*,

<sup>1</sup> Hall v. Lacy, 1 Wright 366.

<sup>2</sup> 7 T. R. 21 n.; and see 2 Show. 494; Parker v. Frambes, 1 Penning. 156; Lofton v. Champion, Ibid. 157; Lane v. Pesant, Ibid. 319; Conner v. London, 2 Ibid. 529; Little v. Heming, Ibid. 552.

<sup>3</sup> Lewis v. Smith, 2 S. & R. 155. And see *ante*, 274, 387, *et seq.*

<sup>4</sup> Bank v. Donaldson, 6 Barr 179.

<sup>5</sup> Lewis v. Smith, 2 S. & R. 155; McCann v. Farley, 2 Casey 173. And see *ante*, p. 390, "Judgment by Confes-

sion," p. 405, "Writ of Inquiry."

<sup>6</sup> Gray's Heirs v. Coulter, 4 Barr 190.

<sup>7</sup> Sect. 11, Purd. Dig. 839, pl. 13; Pamph. L. 84.

<sup>8</sup> Davis v. Railroad Co., C. P. Phila., 2 Phila. R. 146.

<sup>9</sup> Act 15th April 1854, § 55; Purd. Dig. 207, pl. 15; Pamph. L. 546.

<sup>10</sup> Ibid., § 58; Purd. Dig. 207, pl. 20.

<sup>11</sup> Book v. Edgar, 8 Watts 29.

<sup>12</sup> Ibid. 31. And see "Arbitration," Vol. II., *post*.

<sup>13</sup> See "Arbitration," Vol. II., *post*.

with right to appeal within thirty days, and without any judgment entered thereon, will not sustain an execution.<sup>1</sup>

An execution issued on an absolute judgment, taken to indemnify the plaintiff as surety for the defendant, for a debt not paid by the surety at the time of issuing the execution, is not erroneous nor irregular; nor is it fraudulent by the statute of 13 Elizabeth: it is a measure to secure the surety by means intended to produce payment of the debt out of the effects of the principal by whom it is due.<sup>2</sup>

A plaintiff who holds several judgments against a debtor with different sureties or endorsers, may, in the absence of any agreement to the contrary, issue execution upon any one of them, and the proceeds of personal property realized upon such execution will be applied to the debt upon which it issued.<sup>3</sup>

Executions issued by a justice on transcripts from another justice of the same county then in commission are void, not being allowed by the Act of Assembly.<sup>4</sup>

A transcript of a justice's judgment, filed in the Common Pleas, upon the face of which appears the fact of the issuing of an execution by the justice, and a return of *nulla bona* thereto, is a judgment of the Common Pleas, upon which execution may issue; and the execution may recite the judgment in the Common Pleas without reciting the judgment of the justice.<sup>5</sup> And where the fact that an execution was issued by the magistrate and returned *nulla bona* appears from the face of the transcript, a certificate to that effect is not necessary to authorize an execution to issue from the Common Pleas.<sup>6</sup>

An attorney's *præcipe* for a *fi. fa.* on a transcript from a magistrate without a return of *nulla bona* will not protect the prothonotary for the infraction of the Act of Assembly.<sup>7</sup>

Where the record of a magistrate has supplied one transcript for the purpose of a lien, and by its entry a lien has been obtained, the magistrate's record has spent its force; a second transcript secured no lien, and an execution upon it was irregular and void.<sup>8</sup>

Where judgment was entered upon bond and warrant with a stipulation that execution should not issue before default in the payment of several promissory notes, unless the partnership of which defendant was a member should be dissolved, an execution issued before maturity of the notes, without a *scire facias* having been first sued out to ascertain whether the partnership had been dissolved, was irregular, and was accordingly set aside.<sup>9</sup>

In the Supreme Court, where the venue was in one county, it was error to issue a *fi. fa.* directly into another county, and such writ was quashed; the proper course was to issue a *fi. fa.* into the county

<sup>1</sup> Corder v. Mays, 3 Grant 135.

<sup>2</sup> Miller v. Howry, 3 Pa. R. 374.

<sup>3</sup> Marshall v. Franklin Bank, 1 Casey 384.

<sup>4</sup> Hallowell v. Williams, 4 Barr 339.

<sup>5</sup> Hamilton v. Dawson, 4 P. L. J. 141.

<sup>6</sup> Drexel v. Man, 6 W. & S. 343.

<sup>7</sup> Frankem v. Trimble, 5 Barr 520.

<sup>8</sup> Bannan v. Rathbone, 3 Grant 259.

<sup>9</sup> Montelius v. Montelius, 5 P. L. J. 88; s. c. Bright. R. 79.

where the venue was laid, have it returned *nulla bona*, and then issue a *testatum* into the other county.<sup>1</sup>

In strictness a *fi. fa.* cannot issue while a previous *fi. fa.* upon the same judgment is outstanding: the first writ should be previously returned and recited in the second, though a recital is unnecessary where nothing has been levied on the first.<sup>2</sup> And an omission in an *alias* or *pluries fi. fa.*, to recite the proceedings under the first execution, though irregular, does not render such *alias* or *pluries* writ void.<sup>3</sup> So a *fi. fa.* cannot be issued upon a judgment on a *scire facias* to revive, while there is an outstanding *fi. fa.* upon the original judgment: the proper mode is to proceed upon the original *fi. fa.*<sup>4</sup> So where a *testatum fi. fa.* was outstanding against one of several defendants, a *fi. fa.* in the county where the judgment was obtained, issued against all the defendants two years afterwards, was held irregular, on the grounds that the *testatum* was unreturned, and that no execution had been issued within a year and a day against the other defendants.<sup>5</sup>

Though a judgment confessed by a *feme covert* is invalid as a personal obligation of a married woman, yet if the judgment were for the purchase-money of land, an execution restricted to such land may issue thereon.<sup>6</sup>

In Armstrong county, an execution issued without the agency of an attorney at law, is void.<sup>7</sup>

*Matters subsequent to the judgment* sometimes occur to interfere with the issue of an execution otherwise allowable.

Thus a writ of error, regularly sued out, stays the execution until it is decided. So a delay for five years to issue execution will put the plaintiff to a *scire facias*. These, and other matters relating to the time at which the writ should be issued, and to the various circumstances under which execution is stayed by statute, or will be stayed or set aside by the court, will be treated in another part of this section.<sup>8</sup>

A *change of parties* after the judgment is another cause which may prevent the issue of an execution. This change may occur by the marriage, bankruptcy, or death of either the plaintiff or defendant. It is laid down as a general rule that when any new person is to be either better or worse by an execution, there must be a *scire facias*, because he is a stranger.<sup>9</sup>

*Marriage.*—If the plaintiff is a *feme sole*, and marries after judgment, she and her husband must take out a *scire facias* to add the husband as a party before execution can issue.<sup>10</sup> So if a *feme sole* marry after final judgment against her, the husband must be made a party to the record before execution.<sup>11</sup>

<sup>1</sup> Leshor v. Gehr, 1 Dall. 330.

<sup>2</sup> Tidd 1020.

<sup>3</sup> Coleman v. Mansfield, 1 Miles 56.

<sup>4</sup> Gist v. Wilson, 2 Watts 30.

<sup>5</sup> Gibbs v. Atkinson, D. C. Phil., 3 P. L. J. 139.

<sup>6</sup> Ramborger's Admr. v. Ingraham, 2 Wright 146, citing Patterson v. Robinson, 1 Casey 81.

<sup>7</sup> Act 16th April 1866, § 1; Purd. Dig. 1417, pl. 1; Pamph. L. 931.

<sup>8</sup> Post 4, "Of the time within which," &c.

<sup>9</sup> Pennoir v. Brace, 1 Salk. 319.

<sup>10</sup> Berryhill v. Wells, 5 Binn 58; 17 Johns. 271.

<sup>11</sup> 4 East 521; Bingh. on Executions 141.

**Bankruptcy.**—If plaintiff become bankrupt or insolvent after judgment, the assignees or trustees may issue execution in his name for their use.<sup>1</sup> If defendant become bankrupt or insolvent after judgment, the effect is to supersede the execution altogether, and turn the plaintiff over to the mode provided in the insolvent law for the recovery of his claims.<sup>2</sup>

**Death.**—If either party die after final judgment, the personal representatives of such decedent must be brought into court and become parties before execution can issue. And where execution was sued out in the name of the plaintiff after his death, the court below set aside the execution, but the Supreme Court, on error, remitted the record, with directions to permit the names of the personal representatives to be substituted *nunc pro tunc*, and to reinstate the execution.<sup>3</sup> Where an administratrix recovered judgment against her agent for a loss to the estate caused by his negligence, and died, the administrator *de bonis non* of the estate, is the proper person to be substituted as plaintiff.<sup>4</sup> In all cases where the defendant dies after final judgment, before execution can issue, his personal representatives must be warned by *sci. fa.* to show cause against the issue thereof:<sup>5</sup> otherwise the execution is void, and a sale thereunder is invalid;<sup>6</sup> where defendant died after his lands had been levied on and condemned under a *fi. fa.*, it is necessary to bring in his personal representatives by a *scire facias* before a *venditioni* can issue to sell the lands.<sup>7</sup>

The mode of effecting the substitution necessary in case of a change of parties will be discussed hereafter.<sup>8</sup>

Another ground of delay in the issue of a writ arises under the Act of 24th February 1834, which provides that the land of a decedent shall not be charged with the payment of a judgment obtained against his personal representatives, unless the widow and heirs, or devisees, &c., shall be made parties thereto.<sup>9</sup> This is commonly done by a *scire facias* founded on the judgment obtained against the personal representatives.<sup>10</sup> The distinction should here be borne in mind between a judgment obtained against the personal representatives and one obtained against the decedent himself. In the former case the heirs, &c., must be brought in by *sci. fa.*, in order to charge the decedent's lands; in the latter this is not necessary, for the judgment is already a lien, but the personal representatives must be warned by *sci. fa.* before execution can issue.

**Purchase of judgment by third party.**—For a variety of reasons, which it would be irrelevant to enumerate here, it may be deemed proper by a third person, not a party on record, where the execu-

<sup>1</sup> See Act 16th June 1836, § 22; *Purd. Dig.* 541, pl. 30; *Pamph. L.* 734.

<sup>2</sup> See Act 16th June 1836; *Purd. Dig.* 538-545; *Pamph. L.* 731.

<sup>3</sup> *Darlington v. Speakman*, 9 W. & S. 182.

<sup>4</sup> *Lea v. Hopkins*, 7 Barr 385.

<sup>5</sup> Act 24th February 1834, § 33; *Purd. Dig.* 288, pl. 99; *Pamph. L.* 79.

<sup>6</sup> *Cadmus v. Jackson*, S. C., 23 Leg.

Int. 196.

<sup>7</sup> *Woods's Ex'r. v. Colwell*, 10 Casey 92, overruling *Bleecker v. Bond*, 4 W. C. C. R. 6.

<sup>8</sup> See Vol. II., "Scire Facias on change of parties."

<sup>9</sup> Sect. 34, *Purd. Dig.* 288, pl. 100; *Pamph. L.* 79.

<sup>10</sup> See Vol. II., "Scire Facias to charge decedent's lands."

tion has failed of its object, to purchase the judgment, and to take an assignment of it from the plaintiff.<sup>1</sup> When this is done, the plaintiff becomes a trustee to his use, and he may enforce the judgment or not, at his pleasure. Such assignments are liberally supported by the court, particularly where the purchaser has taken one in consequence of, or to protect himself from the *mala fides* of the defendant. As, for example, where the bail has purchased a judgment, his principal keeping without the reach of a bail-piece.<sup>2</sup> Where an execution was issued against several defendants, and the assignee in trust for the creditors of one paid the amount thereof to the sheriff, who marked the execution satisfied, it was ruled that if such payment were a purchase of the judgment, the sheriff might correct the endorsement, and proceed on the writ.<sup>3</sup>

In such case the execution is under the control of the purchaser.

*By what court granted.*—Regularly execution ought to be granted by the same court where judgment was given.<sup>4</sup> But if the record be removed to the superior court on a writ of error, and judgment is there affirmed, the superior court may award execution.<sup>5</sup> Yet on a writ of error from the King's Bench to the House of Lords, only a transcript of the record is sent up, and when remitted, the King's Bench awards execution.<sup>6</sup> And the practice in our Supreme Court in error is to remit the record after judgment in error to the court below, which then awards execution in case the judgment was affirmed.<sup>7</sup>

If the record is removed to another court in any other way than by a writ of error, the court to which it is removed awards execution. The rule is, therefore, that execution issues from the court where the record is.<sup>8</sup> A justice of the peace has no right to issue execution on a judgment of another justice during the temporary absence of the latter: the constable is not bound to execute such writ, and is not liable in damages for his refusal to do so.<sup>9</sup>

2. *Of the different kinds of execution, the object to which each is applicable, and the order in which they may issue. And herein of contemporaneous and successive writs.*

*Fieri facias.*—This writ, named from the words, formerly in Latin, addressed to the sheriff commanding him to "*cause to be made*," out of the goods or lands of the defendant, the amount of the plaintiff's claim, is the most frequently used of any. It applies to lands and goods, or choses in possession, including chattels real. As will be seen hereafter, this writ is to some extent a remedy concurrent with attachment-execution.

*Levari facias* is the ordinary legal writ in this state for collecting charges upon land, as in the case of mortgages, mechanics' liens, and municipal claims,<sup>10</sup> and judgments for registered taxes in Philadelphia.

<sup>1</sup> See *ante*, 666, *et seq.*

<sup>2</sup> See *Ketland v. Medford*, 1 Binn. 497.

<sup>3</sup> *Kuhn v. North*, 10 S. & R. 399. See *Wood v. Vanarsdale*, 3 Rawle 401; *McCarthy v. Share*, 2 Pa. R. 361; *Fleming v. Beaver*, 2 Rawle 128.

<sup>4</sup> Com. Dig., "Execution," (I. 1).

<sup>5</sup> *Ibid.*

<sup>6</sup> Cowp. 843.

<sup>7</sup> See *ante*, "Error," "Remittitur."

<sup>8</sup> Tidd Pr. 994-5.

<sup>9</sup> *Eberle v. Medara*, S. C., 2 Phila. R. 284.

<sup>10</sup> *Hart v. Homiller's Executor*, 11 Harris 39, per LOWRIE, J.

It is said also to be the proper process in equity in such cases. It is directed to the sheriff, commanding him to *cause to be levied* out of the lands specified, the amount of the plaintiff's claim.

*Venditioni exponas* is a secondary writ which issues after a previous *fi. fa.* has been levied upon goods or lands, and has been returned without a sale. It directs the sheriff to *expose to sale* the property embraced in the levy; and he can sell no more than what is therein commanded to be sold.<sup>2</sup> But the plaintiff may have a clause of *fi. fa.* added, to justify the levy and sale of property beyond what is described in the *ven. exp.*<sup>3</sup> As regards personal property, the peculiar office of the *ven. exp.* is to force the sheriff to sell when he has returned the property unsold for want of buyers, and to bring him into contempt for not selling.<sup>4</sup>

*Capias ad satisfaciendum*, is process against the defendant's person, by which the sheriff is directed to arrest the defendant, and detain him in custody till he satisfies the judgment.

*Attachment-execution* is rather a proceeding than a writ, by which the choses in action of the defendant, as well as his goods and chattels, to which he has no right of present possession, may be reached in the hands of strangers, and applied to the satisfaction of the judgment.

*Mandamus-execution* is a writ to enforce the payment of judgments against a municipal corporation.

*Sequestration* is a proceeding by which the revenues of a corporation may be applied to the satisfaction of judgments against the corporation. This writ is also used to reach the life estate of an individual defendant.

*Testatum execution*, is a writ, either a *fi. fa.* or *capias ad satisfaciendum*, issued into another county than that in which the judgment is.

*Order in which executions may issue.*—Under the 19th section of the Act of 1836,<sup>5</sup> execution against the defendant must be taken in the following order, to wit: 1st, upon the personal estate of the defendant; 2d, upon his real estate; 3d, if he have neither personal nor real estate liable to execution, then upon the person of the defendant. And though the plaintiff may issue a *fi. fa. de bonis et terris*, and levy on both goods and lands under the same writ, he must be careful to exhaust the personalty before proceeding to sell the lands under a *venditioni*.<sup>6</sup> So where a *fi. fa.* had been levied on lands, and was undisposed of, the sheriff could not under the same writ levy on coin belonging to the defendant.<sup>7</sup> Though where the sheriff was directed to exhaust the personalty first, but by a mistake he first levied on and advertised the land, and then, finding that there was personal property, levied on and sold that before the sale of the land, it was held that the prior levy on the land was not a relinquishment of the lien upon the personalty.<sup>8</sup>

<sup>1</sup> Hart v. Homiller's Executor, 11 432, pl. 10, Pamph. L. 764.

Harris 39, per LOWRIE, J.

<sup>2</sup> Frisch v. Miller, 5 Barr 315.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Act 16th June 1833, § 19, Purd. Dig.

<sup>6</sup> Childs v. Dilworth, 8 Wright 127, per READ, J.

<sup>7</sup> Rudy v. Commonwealth, 11 Casey 172.

<sup>8</sup> Childs v. Dilworth, 8 Wright 123.

Taken alone, the 19th section requires a levy on the entire personal estate before recourse can be had to the real estate, or the person of the defendant.<sup>1</sup> But as, by subsequent sections of the same act, a certain description of personal property can only be reached by attachment-execution, the rigor of the 19th section is mitigated by the twentieth,<sup>2</sup> which provides in substance that the plaintiff may have execution against the real estate, or against the person of the defendant in the usual mode, or *at his election* he may proceed by attachment-execution against the personal estate to which that process is applicable.<sup>3</sup> The election here mentioned is a privilege of the plaintiff irrespective of the defendant's wishes; and if he has previously issued a *ca. sa.* which remains unexecuted, he is not thereby debarred from issuing and executing an attachment-execution;<sup>4</sup> until execution be had, under a *feri facias* or *ca. sa.* the right to issue an attachment may be exercised.<sup>5</sup> But where a *fi. fa.* has issued, and the land of defendant has been levied and condemned, an attachment-execution will not lie; the plaintiff has made his election.<sup>6</sup>

The act, though allowing a *fi. fa.* and *ca. sa.* to issue at the same time,<sup>7</sup> declares that no *ca. sa.* shall be executed where the defendant has sufficient real or personal estate within the county to satisfy the debt, and if such estate is not sufficient a *ca. sa.* may be executed for the deficiency.<sup>8</sup> Under this act it has been held that, when a *fi. fa.* and *ca. sa.* were issued at the same time, the defendant might be arrested unless he disclosed property to answer the debt and costs.<sup>9</sup> Under the Act of 1807,<sup>10</sup> it was held that there was nothing to prevent the plaintiff from issuing a *ca. sa.* in the first instance at his peril:<sup>11</sup> but where a *ca. sa.* and *fi. fa.* issued together, he should take care not to execute the *ca. sa.* until he had ascertained that the defendant had not property to satisfy the judgment, and this he might do by calling on him to show property;<sup>12</sup> should he arrest him without calling upon him to show property, and the *ca. sa.* should be afterwards set aside, trespass would lie.<sup>13</sup>

*Of contemporaneous writs.*—The general rule is that the plaintiff may have as many executions at the same time as the law affords, and pursue each until satisfaction is obtained upon one.<sup>14</sup> By the 27th section a *ca. sa.* and a *fi. fa.* may be issued at the same time against defendant.<sup>15</sup> And a *feri facias*, *capias ad satisfaciendum*, and attachment-execution may be issued contemporaneously.<sup>16</sup> And an attachment-execution may issue notwithstanding the pendency of

<sup>1</sup> Davis v. Scott, 2 Miles 57.

<sup>2</sup> Purd. Dig. 432, pl. 11, Pamph. L. 764.

<sup>3</sup> Davies v. Scott, 2 Miles 57.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Hallowell v. McClay, C. P. Phila., 3 Phila. R. 261.

<sup>7</sup> Act 16th June 1836, § 27, Purd. Dig. 432, pl. 16, Pamph. L. 766.

<sup>8</sup> Sect. 28, Purd. Dig. 432, pl. 17.

<sup>9</sup> Winder v. Smith, 6 W. & S. 429.

<sup>10</sup> Act 13th April 1807, § 5, 4 Sm. Laws 477.

<sup>11</sup> Hecker v. Jarrett, 3 Binn. 407; Burk v. McFall, 2 Browne 144.

<sup>12</sup> Allison v. Rheam, 3 S. & R. 142.

<sup>13</sup> Ibid.; Berry v. Hamill, 12 S. & R. 210.

<sup>14</sup> Pontius v. Nesbit, 4 Wright 309.

<sup>15</sup> Act 16th June 1836, § 27, Purd. Dig. 432, pl. 16, Pamph. L. 766.

<sup>16</sup> Ibid.; Davies v. Scott, 2 Miles 52.

a *fi. fa.* if no levy has been made.<sup>1</sup> So two writs of attachment-execution may issue for the same debt against different garnishees.<sup>2</sup> But the case is altered if the first writ has been executed in whole or in part. Thus the plaintiff cannot, without leave of the court, abandon a *fi. fa.* partly executed, and issue an attachment-execution.<sup>3</sup> And where a *fi. fa.* has issued, and the land of defendant has been levied on and condemned, an attachment-execution will not lie, the plaintiff has made his election.<sup>4</sup>

So under the Act of 1807, after a *fi. fa.* had been levied on real property, which was condemned, the plaintiff could not abandon these proceedings, and take out a *ca. sa.* without the leave of the court, because the levy was *prima facie* evidence that the defendant had real estate to satisfy the debt, and a *ca. sa.* would be irregular on the face of the proceedings.<sup>5</sup> And so if a *fi. fa.* against personal property has been returned "levied subject to prior executions," the plaintiff must compel a sale of the property levied on before he can issue a *ca. sa.*<sup>6</sup> It should be remarked that the Act of 1807 differs from that of 1836 in this respect, that when the defendant has sufficient real or personal estate, &c., the former act provides that no *ca. sa.* shall issue the latter act provides that no *ca. sa.* shall be executed.

Conversely it was doubted whether, after an arrest of defendant upon a *ca. sa.*, and his discharge upon giving security to take the benefit of the insolvent laws, the plaintiff could withdraw his *ca. sa.*, and issue a *fi. fa.* without leave of the court.<sup>7</sup> But this doubt probably arose, as is suggested in a subsequent case, from considering the arrest as *satisfaction* till the defendant should be finally discharged.<sup>8</sup> It might, however, have arisen upon the general principle stated above.

Where an attachment-execution was discontinued, and a *fi. fa.* issued, it is no objection to the *fi. fa.* that the costs of the attachment were not paid until *after* the *fi. fa.* had issued.<sup>9</sup>

Though two writs of different kinds may be issued coterminously they cannot both be executed at the same time;<sup>10</sup> that is, if the plaintiff procures one of them to be served, he must first dispose of that before he can proceed to execute the other.<sup>11</sup> Thus if, while an attachment execution is pending, the plaintiff proceeds to levy on and condemn defendant's land under a *fi. fa.*, the defendant may have either of the writs set aside at his election.<sup>12</sup> So where

<sup>1</sup> Tams v. Wardle, 5 W. & S. 222; Newlin v. Scott, 2 Casey 102. And see *post*, "Attachment Execution, where it lies."

<sup>2</sup> Pontius v. Nesbit, 4 Wright 309.

<sup>3</sup> Farr v. Carlton, D. C. Phila., 17 Leg. Int. 109.

<sup>4</sup> Hallowell v. McClay, C. P. Phil., 3 Phila. R. 261.

<sup>5</sup> Bank v. Latschaw, 9 S. & R. 11.

<sup>6</sup> Burk v. McFall, 2 Browne 143.

<sup>7</sup> Young v. Taylor, 2 Binn. 230, per YEATES, J.

<sup>8</sup> Bank v. Latschaw, 9 S. & R. 10,

BER GIBSON, J.

<sup>9</sup> Hamilton v. Dawson, 4 P. L. J. 141.

<sup>10</sup> Young v. Taylor, 2 Binn. 230; Burk v. McFall, 2 Browne 144; Allison v. Rheam, 3 S. & R. 142.

<sup>11</sup> Miller v. Parnell, 6 Taunt. 370; Davies v. Scott, 2 Miles 52; Tams v. Wardle, 5 W. & S. 222.

<sup>12</sup> Myers v. Riot, D. C. Phila., March 25th 1848. Why the execution should not be set aside. *Per curiam*. An attachment of execution issued upon this judgment, April 1st 1847. It was duly served, and Anthony G. Querville gar-



the defendant, being arrested on a *ca. sa.*, petitioned for his discharge under the insolvent law, but failed to apply at the succeeding term, according to the provisions of the act; and the plaintiff then took out a *fi. fa.*, and levied on defendant's land, which was condemned, and then issued an *alias ca. sa.*, under which the defendant was again arrested, and subsequently was discharged under the insolvent law; and afterwards the plaintiff issued a *ven. ex.*, and sold the land: it was held that the *fi. fa.* being in operation, the *alias ca. sa.* was irregular; but the defendant having submitted to it, and obtained a discharge therefrom, the proceedings upon the *fi. fa.* became irregular, and a deed to the sheriff's vendee could not be acknowledged.<sup>1</sup> But where a *fi. fa.* and *ca. sa.* issued together, and the sheriff was afterwards instructed not to execute the *ca. sa.*; notwithstanding which the defendant went to the sheriff's office and offered to surrender himself, and induced the officer to go with him to the prothonotary's office, where he gave bond; the court set aside the service of the *ca. sa.*<sup>2</sup>

*Of successive writs. Alias.*—When an execution is returned<sup>3</sup> unexecuted, an *alias* writ of the same species may issue, and if that is returned unexecuted a *pluries* writ may issue, and so on.

Two successive writs cannot be issued returnable to the same term.<sup>4</sup> And the *alias* or *pluries* should be tested as of the term to which the former writ was returnable, and be made returnable to the next ensuing term.<sup>5</sup> It cannot be objected that two writs were sued out to the same term where the inquisition on which the first was founded had been set aside and a new one held.<sup>6</sup>

If the former writ is outstanding an *alias* cannot properly issue.<sup>7</sup> And a *fi. fa.* cannot issue upon a revived judgment while there is an outstanding *fi. fa.* upon the original judgment; the proper mode is to proceed upon the original *fi. fa.*<sup>8</sup> So where a *testatum* was issued against one of several defendants in the judgment, and afterwards a *fi. fa.* against all was issued in the county where the judgment was obtained, the *testatum* being outstanding, the second *fi. fa.* was held irregular, partly on account of the *testatum* being out-

nished. Interrogatories were exhibited and answers filed. A rule to plead was entered, and upon the 3d July, 1847, *nulla bona* was pleaded and the cause at issue. After this, upon the 29th Jan., 1848, an *alias fi. fa.* was issued, upon which an inquisition has been held; property condemned, and a *vend. exp.* sued out.

These last proceedings certainly have placed it in the power of the defendant to elect which writ he would have set aside, the *fi. fa.* or the attachment. Though he might have purchased both, he could not use both, and having procured one of them to be served, he must first dispose of that before he can proceed to execute the other: *Miller v. Parnell*, 6 Taunt. 370; *Davies v. Scott*, 2 Miles 52; *Tams v. Wardle*, 5 W. &

S. 222. The defendant has accordingly asked us to set aside the *alias fi. fa.* and the proceedings based thereon; which is accordingly done. Rule absolute.

<sup>1</sup> *Young v. Taylor*, 2 Binn. 218.

<sup>2</sup> *Davies v. Scott*, 2 Miles 52; *Tams v. Wardle*, 5 W. & S. 222.

<sup>3</sup> See *post*, "Return and its Incidents."

<sup>4</sup> *Shaffer v. Watkins*, 7 W. & S. 219. If this is done the *alias* will be set aside: *Ibid.*

<sup>5</sup> *United States v. Parker*, 2 Dallas 373. In the English practice the *alias* must be tested the day the former writ was returnable: *Tidd* 1023.

<sup>6</sup> *Springer v. Brown*, 9 Barr 305.

<sup>7</sup> *Gist v. Wilson*, 2 Watts 30; *Coleman v. Mansfield*, 1 Miles 56.

<sup>8</sup> *Gist v. Wilson*, 2 Watts 30.

standing, and partly because the writ against the other defendants did not issue within a year and a day after the judgment.<sup>1</sup>

So if the former writ is partly executed, the plaintiff cannot abandon it and issue an *alias* without leave of the court.<sup>2</sup> But when the former writ was levied on land of a stranger, and the defendant at the time disclaimed all title to the land, whereupon the plaintiff abandoned his writ and issued an *alias*, the latter writ will not be set aside on the application of the defendant on the ground that the plaintiff was bound to pursue his levy and condemnation on the former *f. fa.*<sup>3</sup> In such case the return "levied and condemned" to the first writ is not a satisfaction of the execution so far as the defendant is concerned.<sup>4</sup>

This rule seems to be grounded on the presumption that the abandonment of the former writ is a satisfaction of the execution. We shall see hereafter how dangerous it is for the plaintiff to discontinue proceedings when once the property is within the grasp of the sheriff.<sup>5</sup>

But where a former writ had been levied on personal property, the issuing of a second writ, which was withdrawn before any proceedings were had under it, will not constitute an abandonment of the preceding levy.<sup>6</sup>

3. *What property is liable to execution; and herein of exemption from execution, and of the widow's claim.*

The Act of 1836 provides that execution may be had against the personal and real estate of the defendant, and subjects to execution certain descriptions of personal property which previously could not be reached by this process.<sup>7</sup>

*Personal estate.*—In general all the *goods and chattels* of the defendant, which were in his possession at the delivery of the writ to the sheriff, may be taken in execution.<sup>8</sup> But at common law nothing which could not be sold, as deeds, writings, &c., could be taken in execution;<sup>9</sup> and no *choses in action* could be seized in execution,<sup>10</sup> as bank notes, &c.,<sup>11</sup> so a bond or promissory note cannot be levied on or sold as a chattel;<sup>12</sup> nor an unexecuted land warrant in the hands of the deputy surveyor.<sup>13</sup> And though *choses in action* may now be reached, in this state, by the process of attachment

<sup>1</sup> Gibbs v. Atkinson, D. C. Phila., 3 P. L. J. 139.

<sup>2</sup> See Coleman v. Mansfield, 1 Miles 57.

<sup>3</sup> Coleman v. Mansfield, 1 Miles 56. See Hunt v. Breathing, 12 S. & R. 37; Morrison's Appeal, 1 Barr 13.

<sup>4</sup> Coleman v. Mansfield, 1 Miles 56.

<sup>5</sup> See *post*, Sect. II., "Effect of Levy;" Sect. IV., "Abandonment of Proceedings." Hunt v. Breathing, 12 S. & R. 37; Morrison's Appeal, 1 Barr 13.

<sup>6</sup> Ingham v. Snyder, 1 Whart. 116.

<sup>7</sup> Sect. 19-25, Purd. Dig. 432, pl. 10-15; Pamph. L. 764.

<sup>8</sup> Com. Dig. "Execution," (C. 3.)

<sup>9</sup> Ibid. (C. 4.)

<sup>10</sup> Heath v. Knapp, 10 Watts 406. In an early case, Fulton v. Irwin, Add. 40, where notes, the property of defendant, were sold under execution, and purchased by the plaintiff at less than their value, the court recognised the validity of the sale by compelling the plaintiff to account for them at their full value; but the reporter in a note expresses a doubt as to the right to take notes in execution.

<sup>11</sup> Com. Dig. "Execution," C. 4.

<sup>12</sup> Rhoads v. Megonigal, 2 Barr 40.

<sup>13</sup> Heath v. Knapp, 10 Watts 405; Kinter v. Jenks, 7 Wright 445

execution,<sup>1</sup> yet the general rule that they cannot be levied on or sold as chattels still prevails. To this rule, however, two exceptions have been introduced by statute.

*Stock* in any corporation, held in the defendant's own name, may be levied on and sold, subject to debts due by the holder to the corporation.<sup>2</sup> In such case a subsequent sale of the stock under the lien of the corporation, divests the title of the sheriff's vendee; and the lien of a bank upon stock attaches upon protest of the note.<sup>3</sup> Stock owned by a municipal corporation may be levied on and sold under a *fi. fa.* issued out of the United States Circuit Court.<sup>4</sup> But stock standing in the name of defendant, is not liable to execution if it be actually the property of another.<sup>5</sup>

Stock owned by a defendant, and held in his own name, may be reached either by levy and sale, under the Act of 1819, or by attachment execution.<sup>6</sup> Stock belonging to defendant, but not held in his own name, may be reached by attachment execution.<sup>7</sup>

*Coin and bank notes.*—By the Act of 1836, the seizure of coin and bank notes is expressly authorized where the officer can find no real or other personal estate, except where such money is raised by execution at the suit of the debtor, or is actually on his person at the time:<sup>8</sup> this exception does not apply to the case of a surplus in the sheriff's hands after paying an execution *against* the debtor, and such surplus is justly and legally liable to be taken in execution.<sup>9</sup>

And the sheriff may levy on money which is in his hands by virtue of an execution *against* the debtor.<sup>10</sup> But where two unsatisfied executions were in the sheriff's hands, and the defendant paid the officer a sum of money with directions to apply it to the junior execution, the officer might so apply it, and was not bound to levy on such money in his own hands by virtue of the first writ; and having levied on the defendant's real estate the sheriff cannot, whilst that levy remains undisposed of, seize in execution under the same writ a sum of money voluntarily paid him by the defendant, with directions to apply it to a junior execution.<sup>11</sup>

*Chattels pawned* or gaged for a debt, or leased for years, cannot be seized in execution for the debt of the pawnor or lessor;<sup>12</sup> the sheriff cannot *seize* such goods, because the execution-defendant has no right of possession, but he may *sell* the defendant's interest, subject to the rights of the pawnee or lessee; it is reasonable that whatever interest the debtor himself may sell, the sheriff may sell, although it may not be capable of seizure and delivery.<sup>13</sup> And so

<sup>1</sup> See *post*, "Choses in Action," and Sect. III., "Attachment Execution."

<sup>2</sup> Act 29th March 1819, § 2, *Purd.* Dig. 436, pl. 38; 7 *Sm. Laws* 217.

<sup>3</sup> *West Branch Bank v. Armstrong*, 4 *Wright* 278.

<sup>4</sup> *Oelrich v. City of Pittsburgh*, U. S. C. Ct., 17 *Leg. Int.* 4.

<sup>5</sup> *Commonwealth v. Watmough*, 6 *Whart.* 117.

<sup>6</sup> *Lex v. Potters*, 4 *Harris* 295; *Bonaffon v. Wyoming Canal Co.*, D. C. *Phila.*, 4 *Phila. R.* 29.

<sup>7</sup> See *post*, Sect. III.

<sup>8</sup> Sects. 24, 25, *Purd.* Dig. 432, pl. 14, 12, *Pamph. L.* 765. Bank notes are to be taken at their par value. *Ibid.*

<sup>9</sup> *Herron's Appeal*, 5 *Casey* 240.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Rudy v. Commonwealth*, 11 *Casey* 166.

<sup>12</sup> *Strodes v. Caven*, 3 *Watts* 258.

<sup>13</sup> *Ibid.*, per *ROGERS, J.*; *Lindsey v. Fuller*, 10 *Watts* 147; *Welsh v. Bell*, 8 *Casey* 12; *Meyers v. Prentzell*, 9 *Ibid.* 482.

of materials bailed for the purpose of being manufactured.<sup>1</sup> And a lessee's interest in either personal or real estate may be taken in execution.<sup>2</sup> A sheriff seizing goods in the possession of A., under an execution against B., cannot justify the trespass by an authority from C., the rightful owner, but A. will be entitled to nominal damages for the trespass to his possession.<sup>3</sup> But where the goods of one of the defendants were seized in the possession of others of the defendants, and advertised and sold as their property under the writ, the sale divests the owner's interest, and the officer is not a trespasser.<sup>4</sup>

But goods pledged or demised, or money deposited by the defendant, are now, under the Act of 1836, liable to execution, and can be reached by the process of attachment execution.<sup>5</sup>

So in an execution against a member of a partnership under a judgment for his individual debt, the sheriff cannot seize the partnership goods, but can only sell the defendant's interest.<sup>6</sup>

*Goods of a stranger to the writ.*—No questions in practice arise more frequently than those relating to the ownership of goods taken in execution. These questions may be and generally are settled by an issue raised under the Sheriff's Interpleader Act, a proceeding by which a stranger to the writ whose goods have been levied on may intervene, raise the question of title, and have it decided before the sale; this proceeding will be explained below.<sup>7</sup> But one whose goods have been seized under an execution against another person, after notifying the sheriff of his claim,<sup>8</sup> may, if he choose, remain passive until the sale has taken place, and then raise the question of title in an action of trespass against the sheriff, and this mode is frequently adopted. But the sheriff, if he doubts the defendant's title to the goods, may refuse to levy on them until he has been indemnified by the plaintiff against the consequences of a mistake. And a refusal to indemnify in a case where it might reasonably be demanded by the sheriff, would be a justification in an action for a false return.<sup>9</sup>

The plaintiff has a right to levy on property assigned to or claimed by a stranger, for the purpose of having the title tried by a jury (though he and the officers will be liable as trespassers if found to be in the wrong); and it is error for the court to stay his proceedings whilst attempting to sell the property in dispute.<sup>10</sup>

*Of sales by defendant fraudulent in law.*—The case of most common occurrence is where goods in the possession of the execu-

<sup>1</sup> *Pierce v. Sweet*, 9 Casey 151. And the bailee's lien is independent of any special agreement. *Ibid.*

<sup>2</sup> *Lindsey v. Fuller*, 10 Watts 147.

<sup>3</sup> *Rogers v. Fales*, 5 Barr 154.

<sup>4</sup> *Swires v. Brotherline*, 5 Wright 135.

<sup>5</sup> See *post*, "Choses in Action," and Sect. III. of the present Chapter, "Attachment Execution."

<sup>6</sup> *Smith v. Emerson*, 7 Wright 461.

<sup>7</sup> See *post*, Sect. II.

<sup>8</sup> *Helfrich v. Stem*, 5 Harris 143.

Such notice must be specific if the owner knows what goods are seized; if he does not, a general notice will be sufficient to put the sheriff upon inquiry. *Ibid.*

<sup>9</sup> See *Dane's Abr.* 125, c. 1, n. 42, §§ 5, 6. *Spangler v. Commonwealth*, 16 S. & R. 68; *Corson v. Hunt*, 2 Harris 510. And see *post*, "Indemnity."

<sup>10</sup> *Neel v. Bank of Lewistown*, 1 Jones 17. See *Stewart v. Coder*, 1 *Ibid.* 91.

tion-defendant are levied on, and the property therein is claimed by an alleged vendee or assignee of the defendant. The law in this State is, that a sale of personal chattels must be accompanied by an actual delivery of the goods to the vendee, or it will be fraudulent as to the creditors of the vendor;<sup>1</sup> or if the nature and bulk of the articles preclude actual delivery, it must be constructive;<sup>2</sup> and when possession is retained by vendor after the sale it is not only evidence of fraud, but fraud *per se*,<sup>3</sup> and in such case the transaction is fraud in law, and the question is for the court, and not for the jury;<sup>4</sup> but even a temporary change of possession will sometimes, it seems, take the sale out of the category of fraud in law.<sup>5</sup> And it was said that cases of concurrent possession by vendor and vendee are exceptions to the rule.<sup>6</sup> But this has been held otherwise, and there is now no distinction between separate possession by the vendor and concurrent possession by the vendor and vendee.<sup>7</sup> What constitutes a delivery depends upon circumstances;<sup>8</sup> it is said that whatever will authorize the purchaser to take possession without committing a trespass may be regarded as a delivery.<sup>9</sup>

Whether there has been a delivery or not is, where the evidence is conflicting, a question for the jury,<sup>10</sup> but a transfer by a formal instrument of writing is usually but a slight circumstance in the question as to the existence of fraud in the transaction.<sup>11</sup> And where no actual fraud exists, the want of an open and unambiguous change of possession will not render the sale fraudulent in law, if there was an actual delivery of possession in such form as usually and naturally attends such a transaction.<sup>12</sup> And in case of a voluntary sale of household furniture, the lapse of two or three weeks before its removal, during which time the purchaser was looking for

<sup>1</sup> *Twyne's Case*, 1 Smith's Lead. Cas., note by Mr. Wallace. See also *Clow v. Woods*, 5 S. & R. 245; *Pritchett v. Jones*, 4 Rawle 260; *Forsyth v. Matthews*, 2 Harris 100; *Hetrich v. Campbell*, Ibid. 263; *Golder v. Ogden*, 3 Ibid. 528; *Helfrich v. Stem*, 5 Ibid. 143; *Hugus v. Robinson*, 12 Ibid. 9; *Dick v. Cooper*, Ibid. 217; *Dick v. Lindsay*, 2 Grant 431, s. c.; *Haynes v. Hunsicker*, 2 Casey 58; *Born v. Shaw*, 5 Ibid. 288; *Milne v. Henry*, 4 Wright 352; *Myers v. Wood*, 1 Phila. R. 24; *Leech v. Shantz*, D. C. Phila., 2 Phila. 310; *Eckfeldt v. Frick*, D. C. Phila., 17 Leg. Int. 332; s. c. 4 Phila. R. 116; *Grove v. Gilbert*, D. C. Phila., 20 Leg. Int. 37; *Dewart v. Clement*, 12 Wright 413. And see *Wharton's Digest*, "Debtor and Creditor," VI.

<sup>2</sup> *Steelwagon v. Jeffries*, 8 Wright 407.

<sup>3</sup> *Born v. Shaw*, 5 Casey 288; *Milne v. Henry*, 4 Wright 352; *Dewart v. Clement*, 12 Ibid. 413.

<sup>4</sup> *Milne v. Henry*, 4 Wright 352;

*Leech v. Shantz*, D. C. Phila., 2 Phila. R. 310; *Dewart v. Clement*, 12 Wright 413.

<sup>5</sup> See *Graham v. McCreary*, 4 Wright 515.

<sup>6</sup> *Eckfeldt v. Frick*, D. C. Phila., 4 Phila. R. 116.

<sup>7</sup> *Brawn v. Keller*, 3 Grant 145; s. c. 7 Wright 104; *Steelwagon v. Jeffries*, 8 Ibid. 407.

<sup>8</sup> *Chase v. Ralston*, 6 Casey 539. And see the opinion of the court for the law of delivery.

<sup>9</sup> *Smith v. Smith*, 5 Barr 254.

<sup>10</sup> *Forsyth v. Matthews*, 2 Harris 100; *Fry v. Lucas*, 5 Casey 356; *Chase v. Ralston*, 6 Ibid. 539; *Beatty v. Dougherty*, D. C. Phil., 4 Phila. R. 92.

<sup>11</sup> *Forsyth v. Matthews*, 2 Harris 100.

<sup>12</sup> *Hugus v. Robinson*, 12 Harris 9; *Haynes v. Hunsicker*, 2 Casey 58; *Dunlap v. Bournonville*, 2 Casey 72 (commented on in *Eckfeldt v. Frick*, 4 Phila. 116); *Fry v. Lucas*, 5 Casey 356; *Chase v. Ralston*, 6 Casey 539.

a house, will not vitiate the sale, where no process issued against the goods in the interim, nor for ten months after the sale.<sup>1</sup>

And where, from the nature of the transaction, possession either could not be delivered at all, or not without defeating fair and honest objects intended to be effected by the transaction, the case may be regarded as an exception to the rule.<sup>2</sup> So in case of the sale or assignment of a lease for years, an immediate change of possession is not essential to the validity of the transaction.<sup>3</sup> And a sale of personalty in the hands of a bailee is valid against an execution-creditor of the vendor, though there be no actual delivery, if the vendor does not resume possession; and so if the vendee takes possession, and leaves the property with the former bailee for a specific purpose.<sup>4</sup> In such case it was not error for the court to refuse to charge that the sale was a fraud in law, and to leave to the jury the question of fraud in fact.<sup>5</sup> And in a sale of fixtures it is not necessary for the vendee to take immediate possession, because fixtures are a part of the realty, and do not come within a rule which applies exclusively to chattels personal.<sup>6</sup>

Where there was a *bond fide* sale and actual delivery of a chattel, the fact that vendee some weeks afterwards lent the chattel for a specific purpose to the former owner, in whose hands it was seized in execution for his debt, does not vitiate the sale.<sup>7</sup> And a sale and delivery of a chattel actually levied on, part of the price being applied in payment of the execution, is not a legal fraud.<sup>8</sup>

Where there has been a delivery, if the vendee suffers the chattel to be sold under execution against the vendor, he remains liable to the vendor for the price.<sup>9</sup> A mortgage of a chattel is valid if the mortgagee take such possession of the thing pledged as its nature and the circumstances will admit.<sup>10</sup>

*Collusive sheriffs' sales of defendant's goods.*—Sheriffs' sales of personalty are sometimes collusive, being designed to cover the defendant's property from his creditors; in such cases the sale is invalid, and the property remains liable to levy and sale by the creditors of defendants.<sup>11</sup> Merely leaving the goods purchased at sheriff's sale in the possession of the defendant for his use, or under a contract of bailment, does not render them liable to execution as the property of the defendant.<sup>12</sup> But where cloth was left by the purchaser with defendant, a tailor, to be made up for the defendant's own profit, he accounting to the purchaser only for the price of the cloth, this was not a bailment but a sale to the defendant, and the goods were liable to levy and sale as his property.<sup>13</sup>

<sup>1</sup> Smith v. Stern, 5 Harris 360.

<sup>2</sup> Born v. Shaw, 5 Casey 288.

<sup>3</sup> Williams v. Downing, 6 Harris 60.

<sup>4</sup> Linton v. Butz, 7 Barr 89. And see cases there cited.

<sup>5</sup> Roberts v. Guernsey, 3 Grant 237.

<sup>6</sup> Strauss v. Davy, D. C. Phila., 3 Phila. Rep. 137; Knight v. Bank, Ibid. 138. In such sale the landlord's assent is not necessary to render it valid against creditors, but is only material as concerns the landlord himself:

Strauss v. Davy.

<sup>7</sup> Brady v. Haines, 6 Harris 113.

<sup>8</sup> Ibid.

<sup>9</sup> Fry v. Lucas, 5 Casey 356.

<sup>10</sup> Fry v. Miller, 9 Wright 441.

<sup>11</sup> McMichael v. McDermott, 5 Harris 353.

<sup>12</sup> Walter v. Gernant, 1 Ibid. 515;

Dick v. Lindsay, 2 Grant 431; Dick v. Cooper, 12 Harris 217.

<sup>13</sup> Dick v. Lindsay; Dick v. Cooper, *supra*.

So misconduct on the part of the successful bidder may vitiate the sale, and leave the goods still liable to execution as the property of defendant, as if he *falsely* declare that he is buying for the family of defendant, though not if such declaration is true; or if he *falsely* told other bidders that he was buying under an arrangement for the common benefit of the creditors; or make any false declaration of intention in order to gain a particular advantage.<sup>1</sup>

If the goods were bought in for the family with the debtor's money, the property is not divested, and they remain liable to execution for his debt.<sup>2</sup>

Where the plaintiff in the execution bought the goods at a price much below the amount of his judgment, but the possession was not changed, nor any credit given on the judgment, nor a receipt given to the sheriff for the amount of the bid, and the plaintiff afterwards received the whole amount of his judgment from another fund, it was held that the goods were liable as the property of defendant to levy and sale under an execution issued after payment of the judgment:<sup>3</sup> and this though the plaintiff had other claims against the defendant beyond the amount of his bid, and exceeding the amount of his receipt given on payment of the judgment and not mentioned therein.<sup>4</sup> Where there were no other writs in the sheriff's hands at the time, the want of an actual levy and seizure of the goods is immaterial, when the constructive levy was immediately followed by a sale at which the goods were in the actual power and control of the sheriff: nor is it a ground of legal fraud that the sheriff had given the advertisements to the defendant to be posted, especially where there were many bidders at the sale; nor that the plaintiffs purchased all the property, and that the prices were low, if the sale was public, without adverse levy or claim, and without remonstrance on the part of the defendant.<sup>5</sup>

*Actual fraud.*—A private sale or assignment of personalty may be fraudulent and void, though accompanied by delivery of possession.<sup>6</sup> If the possession is not changed the sale is a fraud in law, as has already been seen, but actual fraud or fraud in fact does not depend upon the non-delivery of the goods. The existence of actual fraud is a question for the jury.<sup>7</sup> Of course no general rule can be laid down as to what constitutes actual fraud. It is a question of intention, and intention is to be inferred by the jury from all the circumstances.<sup>8</sup> The facts that the defendant was indebted at the time of the sale; that he was then insolvent and his vendee knew it; that shortly after the voluntary sale a large amount of judgments were obtained against him for debts due before the sale, are evidence to show that such sale was fraudulent as against the vendee's creditors.<sup>9</sup> It is in most cases the turning-point upon the question of

<sup>1</sup> *Walter v. Gernant*, 1 Harris 515. 394.  
And see *post*, Sect. II., "Sheriff's Sale, Misconduct of Purchasers."

<sup>2</sup> *Walter v. Gernant*, 1 Harris 515. <sup>6</sup> *Forsyth v. Matthews*, 2 Harris 100.

<sup>3</sup> *Schott v. Chancellor*, 8 Harris 195. <sup>7</sup> *Brady v. Haines*, 6 Harris 113;

<sup>4</sup> *Chancellor v. Schott*, 11 Harris 68. <sup>8</sup> *Forsyth v. Matthews*, 2 Harris 100.

<sup>5</sup> *Allentown Bank v. Beck*, 13 Wright <sup>9</sup> *Milne v. Henry*, 4 Wright 352.

<sup>6</sup> *Helfrich v. Stem*, 5 Harris 143.

actual fraud in a sale of chattels by one in debt, What did the vendor do with the money? and if a cloud rests upon that, the *bona fides* of the vendor ought to shine as clear as the sun to disperse it.<sup>1</sup>

So an actual delivery to the vendee will not prevent a levy at the suit of a creditor of the vendor, where, by the terms of the agreement, the property was not to vest in the vendee until he had performed some act in reference thereto; and in such case the entire property passes by the sheriff's sale, and the vendor's receipts for partial payments are only evidence of advancements by the vendee for which he had no lien.<sup>2</sup>

In general, a sale or assignment of personalty by one largely indebted, or in contemplation of insolvency, is fraudulent as against his creditors.<sup>3</sup> So an assignment of property *in trust* to sell part of it to pay for advances, and to retain part of it subject to the future order of the assignor, is intended only as a cover to keep off execution-creditors, and has premeditated fraud on its face.<sup>4</sup> So if the sale and delivery be accompanied by a secret trust from which the debtor might derive, ultimately, a pecuniary benefit, it is fraudulent and void as against creditors.<sup>5</sup> In this State voluntary assignments for the benefit of creditors are regulated by various Acts of Assembly, to which we can only refer.<sup>6</sup> Such assignments must be recorded within thirty days.<sup>7</sup> They must not prefer one or more creditors (except laborers for wages<sup>8</sup>), and a condition in an assignment, for the benefit of such creditors only as shall execute a release, is void.<sup>9</sup> The Act of 17th April 1843 does not prevent one in failing circumstances from paying particular creditors in full; nor does it prohibit the assignment of a *chose in action* for the purpose of securing a particular debt; and the delivery of such *chose in action* to a stranger in trust for the assignee's use is good.<sup>10</sup> So a debtor may lawfully, by deeds and bills of sale, transfer to a creditor his entire property in consideration of the satisfaction of the claim and the appropriation of the balance of the price in discharge of debts due certain other specified creditors; provided the consideration is a fair price, and the transaction is *bona fide* with the honest intent of paying the preferred creditors: and the *bona fides* of the transaction is a question for the jury and not for the court.<sup>11</sup> Such preference by an insolvent debtor may be made by judgment, deed, or in any other mode except by an assignment in trust; and it is no objection to the validity of a fair and honest transaction of this kind, that the debtor had other creditors who were delayed

<sup>1</sup> Bastian v. Dougherty, D. C. Phila., 3 Phila. R. 30.

<sup>2</sup> Mitchell v. Com., 1 Wright 187.

<sup>3</sup> Stat. 13 Eliz. ch. 5. See Reinheimer v. Hemingway, 11 Casey 437; Deakers v. Temple, 5 Wright 234.

<sup>4</sup> Hart v. McFarland, 1 Harris 182.

<sup>5</sup> Connelly v. Walker, 9 Wright 449.

<sup>6</sup> These are collected in Purd. Dig., title "Assignments." An assignment passes title to the assignee though his bond is not filed and approved within 30 days, and it is not for want of ap-

proval inoperative and void against subsequent execution-creditors; Heckman v. Messinger, 13 Wright 465.

<sup>7</sup> Act 24th March 1818, § 5, Purd. Dig. 61, pl. 6; 7 Sm. Laws 132; Thomas v. Lowber, 2 Harris 438.

<sup>8</sup> Act 17th April 1843, § 1, Purd. Dig. 60, pl. 2, Pamph. L. 273.

<sup>9</sup> Act 16th April 1849, § 4, Purd. Dig. 60, pl. 3, Pamph. L. 664.

<sup>10</sup> Mellon's Appeal, 1 Grant 212.

<sup>11</sup> York Bank v. Carter, 2 Wright 446.



thereby or wholly prevented from obtaining payment.<sup>1</sup> And it is for the jury to determine whether the transaction was a sale, or the creation of a trust for the benefit of creditors.<sup>2</sup>

From the above it may be inferred, that while an insolvent debtor cannot make a gift of his chattels, or sell them to a stranger, or dispose of them to any one at less than a fair price, without incurring the risk of having the transaction treated as fraudulent and collusive, he may safely deliver a chattel at a fair valuation to a creditor, in satisfaction of an honest debt.

A mother holding personal property in trust for her children, has the legal right to give or sell it to them, in order to prevent it from being levied upon by a firm-creditor of the mother and her husband, where no judgment or execution exists against her at the time, or is in immediate prospect.<sup>3</sup>

One who *bond fide*, for a valuable consideration, and without notice, purchases a chattel from a fraudulent vendee, takes a title clear of the fraud whether it be actual or legal.<sup>4</sup>

*Sale after notice of execution.*—A sale of chattels by the defendant after notice of the issue of execution, is a fraud in law of which the jury has not jurisdiction; and if the vendee has also notice of the pendency of the writ, he takes no title as against creditors of the vendor.<sup>5</sup> But where after an assignment for the benefit of creditors, the assignor, with the assent of the assignee, sold part of the goods for a valuable consideration, and delivered possession, and an execution had been left with the sheriff between the assignment and sale, but the attorney of plaintiff informed the intended purchaser that these goods would not be levied on, the sheriff taking the goods is a mere trespasser.<sup>6</sup>

*Goods purchased by defendant but not delivered.*—The case of a levy upon chattels sold by the creditors of the vendee, presents a different question from the above: here the question of fraud can rarely arise; but the point to be considered is, whether there has been such a transfer of the property as will give the vendee an interest which may be levied on. If there has been an actual delivery of the chattel, it may be levied on by the creditors of the vendee whether the sale was absolute or conditional, and whether the price has been paid or not.<sup>7</sup> Whatever will authorize the purchaser to take possession without committing a trespass, may be regarded as a delivery.<sup>8</sup> Where the vendor retains possession but the price is part paid, the chattel may be levied on by vendee's creditors, and, on paying the balance due the vendor, the purchaser at sheriff's sale acquires the right to the possession.<sup>9</sup> So where one

<sup>1</sup> York Bank v. Carter, 2 Wright 446. And see the cases there cited: Valance v. Insurance Co., 6 Ibid. 441; Keen v. Kleckner, Ibid. 529.

<sup>2</sup> Ibid.

<sup>3</sup> Smith v. Stern, 5 Harris 360.

<sup>4</sup> Thompson v. Lee, 3 W. & S. 479; McMahon v. Sloan, 2 Jones 232; Sinclair v. Healy, 4 Wright 417.

<sup>5</sup> Reinheimer v. Hemingway, 11

Casey 432.

<sup>6</sup> McElrath v. Kintzing, 5 Barr 336.

<sup>7</sup> Jenkin v. Eichelberger, 4 Watts 121; Rose v. Story, 1 Barr 190; Stiles v. Whitaker, D. C. Phila., 1 Phila. Rep. 271; Bowen v. Burk, 1 Harris 146. But see Lehigh Company v. Field, 8 W. & S. 232.

<sup>8</sup> Smith v. Smith, 5 Barr 254.

<sup>9</sup> Rose v. Story, 1 Barr 190.

had purchased the right to quarry and remove stone, to be used in constructing certain canal locks, the quantity to be estimated in the locks, and to be paid for at a certain rate when the canal contractors should be paid, the vendee had a property in stone quarried by him under his agreement, but not removed, which might be levied on.<sup>1</sup> Where the purchaser of machinery for his mill, which had been partly delivered and set up, made a written agreement with the vendor that the machinery and boilers were the property of the vendor, and the latter agreed to leave them where they were for three months, in order to give the vendee time to make an arrangement with his creditors, and in the event of his inability to do so, then the vendor was to be left to his legal remedy for the machinery already furnished, or to the removal of the same at his option, it was held that the vendor's property was not divested by a sheriff's sale of the articles under an execution against the vendee.<sup>2</sup>

A contract for the purchase of chattels by one as agent for another, which is subsequently rescinded by tacit consent of all parties, and a new and binding sale of the goods made by the agent to a third party while they are *in transitu*, vests no property in the first vendee or in the agent, and does not render the property liable in execution against either.<sup>3</sup> Evidence of other fraudulent sales of other property by the parties interested in the sale in controversy, are inadmissible as evidence to impeach its validity.<sup>4</sup>

*Confusion of goods.*—Although it is well settled that he who wilfully intermixes his goods with those of another cannot recover them or their value from the other party, if it be impossible to distinguish and separate them, yet where there is evidence of fraudulent conduct between two parties, in regard to the creditors of one of them, an improper intermixture of their goods by the party indebted, acting as the agent of the other, cannot be taken advantage of, nor disavowed, by the principal in a contest with a *bonâ fide* execution-creditor of the party by whom the intermixture was made: as to such creditors the colluding parties are one.<sup>5</sup> Where an agent converts to his own use goods intrusted to his care, or misapplies them, the principal does not thereby acquire title to like goods of the agent, as in the case of confusion of goods: and therefore where a stranger to the writ, claiming property in the goods levied on, could find none that he could identify by his marks or otherwise, but claimed a like number of similar goods out of the bulk, on an issue framed to try his title, he was bound to show that his goods were among the property levied on; and it was not enough for him to rely upon the fact that his similar goods had been wrongfully appropriated by the defendant in the execution.<sup>6</sup> If the sheriff knew at the time that a portion of the goods levied on had never belonged to the defendant in the execution, he would be liable as a trespasser, as to such additional goods, unless he gave the owner notice or per-

<sup>1</sup> Watts v. Tibbals, 6 Barr 446.

<sup>2</sup> Shell v. Haywood, 4 Harris 523.

<sup>3</sup> Huntzinger v. Harper, 8 Wright 204.

<sup>4</sup> Ibid.

<sup>5</sup> McDowell v. Rissell, 1 Wright 164.

<sup>6</sup> Wood v. Fales, 12 Harris 246. And

see the opinion of the court below s. c. D. C. Phila., 1 Phila. R. 499.

mission to remove them: if the sheriff did not know that fact, the alleged owner, in order to render him liable as a trespasser as to such goods, should have notified him of the fact, and such notice should be specific where the owner knew what goods had been levied on; but where he did not know what precise goods had been seized, a general notice to the sheriff would be sufficient to put him on inquiry.<sup>1</sup> But where goods of one of the defendants were seized in the possession of others of the defendants, and were advertised and sold as their property, the sale divests the owner's interest, and the officer is not a trespasser.<sup>2</sup>

*Goods belonging to defendant's wife.*—The Married Woman's Act<sup>3</sup> protects the property of a wife from her husband's creditors. To bring it within that protection it is necessary to prove that she owns it as having been hers before marriage, or that she acquired it afterwards and in what way: mere evidence that she purchased it, or had the means of paying for it, is not sufficient to give her title; it must be satisfactorily shown that it was paid for with her own separate funds: in the absence of positive evidence to this effect, the presumption is violent that the husband furnished the means of payment: and this applies as well to real as to personal estate.<sup>4</sup> Her share of her father's estate, paid to her after the act, is protected by it, though her father died before its passage.<sup>5</sup> Unless the fact of her separate ownership of the purchase-money be fully proved, the question ought not to be submitted to the jury: it is error to submit it without evidence.<sup>6</sup>

Goods purchased by a married woman on her own *credit* and used as stock in trade by her, are not her separate property within the meaning of the Act of 1848.<sup>7</sup> And where a married woman, residuary legatee of her deceased brother, who had directed his executors to sell his stock of goods, took the goods at the appraisement, agreeing therefor with the administrator to pay the testator's debts, in amount greater than the value of the goods, and kept store, the husband living in the house and assisting in the business, this was a purchase on credit, and the stock kept up by sales and purchases was not within the protection of the act.<sup>8</sup> But where she is the *bonâ fide* owner of a stock of merchandise, although not a *feme sole* trader, she can trade with them, and buy other goods with the proceeds, exempt from seizure for her husband's debts.<sup>9</sup>

A mere trespasser taking the goods has no right to dispute the

<sup>1</sup> Helfrich v. Stem, 5 Harris 143.

<sup>2</sup> Swires v. Brotherline, 5 Wright 135.

<sup>3</sup> Act 11th April 1848, § 6, Purd. Dig. 699, pl. 11, Pamph. L. 536.

<sup>4</sup> Keeney v. Good, 9 Harris 349; Hoar v. Axe, 10 Harris 381; Bradford's Appeal, 5 Casey 515; Topley v. Topley, 7 Ibid. 328; Auble's Adm'r. v. Mason, 11 Ibid. 261; Walker v. Reamy, 12 Ibid. 410; Winter v. Walter, 1 Wright 155; Rhoads v. Gordon, 2 Ibid. 277; Aurand v. Schaffer, 7 Ibid. 363; Gault v. Saffin, 8 Ibid. 307; Hoffman v. Toner, 13 Ibid. 231; Flick

v. Devries, 14 Ibid. 266.

<sup>5</sup> Mellinger's Adm'r. v. Bausman's Trustee, 9 Wright 522.

<sup>6</sup> Aurand v. Schaffer, 7 Wright 363; Gault v. Saffin, 8 Ibid. 307.

<sup>7</sup> Robinson v. Wallace, 3 Wright 129; Hoffman v. Toner, 13 Ibid. 231.

<sup>8</sup> Hoffman v. Toner, 13 Wright 231.

<sup>9</sup> Wieman v. Anderson, 6 Ibid. 311. In this case the original stock of goods was bought by her brother at a sheriff's sale of her husband's goods, and afterwards given by the brother to her.

assertion of both husband and wife, that the goods belong to the wife.<sup>1</sup>

If a husband has permitted his wife to acquire chattels by her own labor, or by a gift from himself or another, a subsequent voluntary assignee for the benefit of the husband's creditors cannot impeach her title; though the creditors themselves might do so.<sup>2</sup>

Where a resident of Missouri transferred to a trustee for his wife under the law of that State, all his household furniture, and, having afterwards moved to Pennsylvania and contracted debts, his wife's title was contested by his creditors, it was held that as she owned the property in Missouri, she would still own it after moving into Pennsylvania, and that creditors could avoid her title only by showing that the transaction was intended as a fraud upon them.<sup>3</sup>

A post-nuptial settlement of personal property fairly made by a husband, not indebted at the time, as a reasonable provision for his wife, is not fraudulent *per se*; but is void only when made with a fraudulent intent, which he who alleges must prove: the possession of a wife under a settlement being necessarily concurrent with her husband, does not render it void: the conveying of goods by the husband, for a nominal consideration, to a trustee in trust for the benefit of the wife, just before or at the time of engaging in a hazardous business, is not necessarily a fraud as to future creditors, but only so if conveyed with an intent to protect the goods from their grasp; and the jury are, generally, to judge of the intent from such badges as the transaction wears.<sup>4</sup>

*Feme sole traders.*—A recent act provides a mode of proceeding by a wife in certain circumstances to have herself declared a *feme sole* trader, whereupon she may engage in business and her property, however acquired, is free from interference on the part of her husband.<sup>5</sup>

*Goods of defendant's son.*—Where a minor son of the defendant had been emancipated by his father from his control, and having taken a lease of his father's land from the sheriff's vendee, had acquired property by gift and by his own industry, the father and family residing with the son on the land, such property was not liable to execution for the debts of the father.<sup>6</sup>

*Partnership goods.*—Under an execution against one partner the sheriff cannot sell the *goods* of the partnership; but only the *interest* of the defendant in the partnership effects.<sup>7</sup> And such interest can be made available only by an account between the partner and the partnership, and it is an item in such account that enough must be left for the partnership debts.<sup>8</sup> The right to confine the purchaser to his interest in the surplus belongs to the remaining partners, and may be insisted on or waived by them at their pleasure: the creditors of the firm cannot enforce it.<sup>9</sup> Where some of the members of the

<sup>1</sup> Hoar v. Axe, 10 Harris 381.

<sup>2</sup> Rogers v. Fales, 5 Barr 158.

<sup>3</sup> Reid v. Gray, 1 Wright 508.

<sup>4</sup> Larkin v. McMullin, 13 Ibid. 29.

<sup>5</sup> Act 4th May 1855, § 2-4, Purd. Dig. 474, pl. 5, 6, Pamph. L. 430. And see Purd. Dig. 474, title "Feme Sole

Traders."

<sup>6</sup> McCloskey v. Cyphert, 3 Casey 220.

<sup>7</sup> Bogue v. Steel, D. C. Phila., 1 Phila. R. 90. And see *post*, Sect. II.,

"Distribution."

<sup>8</sup> Baker's Appeal, 9 Harris 76.

<sup>9</sup> Ibid.

partnership plaintiff are also members of the partnership defendant, the execution cannot be levied on the separate property of one member of the defendant firm.<sup>1</sup>

*Chattels of a corporation* may in some cases be seized in execution.<sup>2</sup> But all the personal property of a railroad company, cars, rails, &c., &c., necessary to carry on its operations, are exempt from levy and sale under a *fi. fa.* for an ordinary debt: so are old or new rails and chairs lying along the track of the road in readiness for repairs or construction.<sup>3</sup> The franchises of certain species of corporations may be sold in execution.<sup>4</sup>

The remedy against a corporation is by sequestration, which will be explained hereafter.<sup>5</sup>

*Choses in action.*—By the common law the sheriff under a *fieri facias* could only levy upon chattels, and *choses in action* of course were not liable to be taken in execution. And this was the law of this State until modified by legislation. The Act of 29th March 1819 authorized stock held in corporations by individuals in their own names to be levied on and sold in the same manner as chattels, subject to any debt due by the holder to the corporation,<sup>6</sup> and is still in force.<sup>7</sup> But stock standing in defendant's name is not liable to levy and sale under this act, if it be actually the property of another.<sup>8</sup>

So a bond or promissory note cannot be levied on or sold as a chattel;<sup>9</sup> nor an unexecuted land warrant in the hands of the deputy surveyor.<sup>10</sup> But now nearly every species of *choses in action* is liable to execution.<sup>11</sup> The 3d section of the Act of 29th March 1819 provides a method of execution against stock in a corporation which is the property of the defendant, though standing in the name of another on the books of the corporation: this will be explained hereafter.<sup>12</sup> And the Act of June 16th 1836 introduces a new process, the attachment-execution, by which the plaintiff may reach stock owned by defendant but held in the name of another, or owned and held by defendant in his own name, debts due to the defendant, deposits of money made by him, and goods or chattels of the defendant pawned or pledged by him as security for any debt or liability, or demised, delivered, or bailed for a term, subject in the latter case to the rights of the pawnee, bailee, or lessee.<sup>13</sup> This has since been extended to legacies given and lands devised to defendant, and to any interest which he may have in the real or personal estate of any

<sup>1</sup> *Tassey v. Church*, 6 W. & S. 465.

<sup>2</sup> See *post*, Sect. VII., "Execution against Corporations."

<sup>3</sup> *Covey v. P., F. W. & C. Railroad Co., C. P. Beaver*, 15 Leg. Int. 228; 3 Phila. Rep. 172, s. c.

<sup>4</sup> See *post*, Sect. VII., "Execution against Corporations."

<sup>5</sup> *Ibid.*

<sup>6</sup> Act 29th March 1819, § 2, *Purd. Dig.* 436, pl. 38, *Pamph. L.* 226, 7 *Sm. Laws* 217.

<sup>7</sup> *Lex v. Potters*, 4 *Harris* 295.

<sup>8</sup> *Commonwealth v. Watmough*, 6 *Whart.* 117.

<sup>9</sup> *Rhoads v. Magonigal*, 2 *Barr* 40.

<sup>10</sup> *Heath v. Knapp*, 10 *Watts* 405; *Kinter v. Jenks*, 7 *Wright* 445.

<sup>11</sup> Act 16th June 1836, §§ 22, 23, *Purd. Dig.* 432, pl. 12, 13, *Pamph. L.* 764.

<sup>12</sup> See *post*, Sect. III., "Attachment Execution, Levy on Stock."

<sup>13</sup> Act 16th June 1836, §§ 32-38, *Purd. Dig.* 434, pl. 27-34, *Pamph. L.* 767.

decedent by will or otherwise.<sup>1</sup> The proceedings in attachment-execution will be explained hereafter.<sup>2</sup>

*Fixtures.*—1. *Where the defendant is owner of both the land and fixtures*, the question is whether the fixture is to be levied on as real or as personal estate. The general rule is that machinery of a manufactory which is necessary to make it a manufactory, will pass by a sheriff's sale of the land.<sup>3</sup> So where the instrument or utensil is an accessory to anything of a personal nature, as to the carrying on of a trade, it is to be considered as a chattel; but where it is a necessary accessory to the enjoyment of the inheritance it is to be considered a part of the inheritance.<sup>4</sup> And the fragments of a building, blown down by a tempest, are not thereby converted into personalty, but pass to the purchaser of the realty at a sheriff's sale.<sup>5</sup> But gas-fixtures, such as chandeliers and side-brackets, put up and attached to the gas-pipes by the owner of the premises, are mere personal property, not fixtures in the proper sense of the term, and do not pass by a sheriff's sale of the real estate.<sup>6</sup>

But fixtures, by agreement of plaintiff and defendant, where there is no party injured by such agreement, may be sold under an execution as personal property.<sup>7</sup> And where there were prior judgments against the land, an execution-creditor who, with the assent of the owner, has levied on and sold the machinery as personalty, is entitled to the proceeds of the sale, although the purchaser at such sale buys at his own risk, and will get no title if the machinery is not personalty.<sup>8</sup> And although the machinery of a cotton-mill is part of the realty, yet by the agreement of the owner and lien-creditors it may be detached, and converted into personalty, and if this has been done it will not pass under a sheriff's sale of the freehold.<sup>9</sup> So where the sheriff sold machinery in a mill under a *fi. fa.*, with the verbal consent of the owner of the land, and the purchaser paid the price and took possession, his title is good against a subsequent vendee of the land before actual severance.<sup>10</sup> But where after the entry of a judgment against the owner of land, he sold a fixture, and then sold the land to another person, with notice of the previous sale of the fixture, and the fixture was never actually delivered, but was in a short time re-annexed to the freehold, and continued to be so used, and subsequently the vendee of the land became the purchaser at the sheriff's sale under the judgment, he thereby became the owner of the fixture, nor was his title as sheriff's vendee affected by his knowledge of the sale of the fixture, nor by his own previous admissions that it belonged to the purchaser, there being no contract or con-

<sup>1</sup> Act 13th April 1843, § 10, *Purd.* Dig. 435, pl. 35, *Pamph. L.* 235.

<sup>2</sup> *Post*, Sect. III., "Attachment-Execution."

<sup>3</sup> *Oves v. Oglesby*, 7 *Watts* 106; *Voorhis v. Freeman*, 2 *W. & S.* 119; *Pyle v. Pennock*, *Ibid.* 390; *Harlan v. Harlan*, 3 *Harris* 513; s. c., 8 *Ibid.* 303.

<sup>4</sup> *Case of the Olympic Theatre*, 2 *Browne* 285.

<sup>5</sup> *Rogers v. Gilinger*, 6 *Casey* 185.

<sup>6</sup> *Vaughen v. Haldeman*, 9 *Ibid.* 522.

<sup>7</sup> *Piper v. Martin*, 8 *Barr* 206; *White's Appeal*, 10 *Ibid.* 252.

<sup>8</sup> *Hutchman's Appeal*, 3 *Casey* 209. In such case the prior judgment-creditors may prevent the severance where the machinery is realty, or may, perhaps, pursue the property after severance, but they have no lien upon the fund: *Ibid.*

<sup>9</sup> *Harlan v. Harlan*, 8 *Harris* 303.

<sup>10</sup> *Mitchell v. Freedley*, 10 *Barr* 198.

sideration for such statements, which would preclude him from acquiring such title as a stranger might have acquired by a purchase at sheriff's sale.<sup>1</sup> It had been previously held that a sale of a fixture by the owner of land bound by a judgment, accompanied by actual severance, passed the property divested of the lien of the judgment.<sup>2</sup> And where there was no actual severance of the fixture until after the sheriff's sale of the land on the prior judgment, the assent of the purchaser of the land who was plaintiff in the judgment, to a subsequent severance, if made with a full knowledge of his legal rights as sheriff's vendee, will bind him.<sup>3</sup>

On the other hand, the sale under execution of machinery in an unfinished grist-mill, as the personal property of the owner of the mill, will not prevent the maker of the machinery from showing that the title, and right to remove it, were in himself, and not in the owner of the mill.<sup>4</sup>

A mortgage of a machine-shop includes all its fixtures as such, and the mortgagor cannot remove them to the injury of the mortgagee; and as a purchaser of a fixture from mortgaged premises is affected with a knowledge of the existing lien, the sale is a fraud upon the mortgagee, and he may levy on the fixture in the hands of the vendee.<sup>5</sup> And when the encumbrances are greater than the value of the property, the severance of the engine and machinery by the owner, is a fraud upon the prior judgment-creditors such as a court of equity will restrain by injunction.<sup>6</sup>

2. *Where the defendant's lessee erected the fixtures*, though there appears to have been no decision in this state directly in point, it is evident that a question between the tenant and judgment-creditors of the landlord or purchasers at sheriff's sale, under judgment against the landlord, would turn upon the point whether the character of the fixtures be such that as between landlord and tenant, the latter would have the right to remove them. On this point we refer to Smith's Leading Cases.<sup>7</sup>

3. *Where the defendant is lessee*, fixtures erected by him during his term, and removable by him at its expiration, are personalty, and subject to levy and sale in execution by his creditors.<sup>8</sup> Such is a steam-engine set up and used by the lessee for more advantageously carrying on the manufacture of salt.<sup>9</sup> And an engine-house, partly of stone and partly of wood, with stone foundations for a steam-engine, erected by tenant for years for the use of a coal-mine, he having by the terms of his lease the privilege of removing all fix-

<sup>1</sup> Heaton v. Findlay, 2 Jones 304.

<sup>2</sup> Ross's Appeal, 9 Barr 494, per BELL, J.

<sup>3</sup> Harlan v. Harlan, 8 Harris 303.

<sup>4</sup> Shell v. Haywood, 4 Ibid. 523. And acts and declarations of the owner to that effect, made before execution issued, are admissible in favor of the maker's claim: Ibid.

<sup>5</sup> Hoskin v. Woodward, 9 Wright 42.

<sup>6</sup> Witmer's Appeal, Ibid. 455.

<sup>7</sup> Elwes v. Mawe, 1 Sm. Lead. Cases

215, Am. notes.

<sup>8</sup> Church v. Griffith, 9 Barr 118; White's Appeal, 10 Ibid. 252. And the execution-creditor will be entitled to the proceeds in preference to a mechanics' lien claimant: Ibid.

<sup>9</sup> Lemar v. Miles, 4 Watts 330. And it does not alter the case that by the terms of the lease the fixture, in a certain event, was to become the property of the landlord, if such event did not actually occur: Ibid.

tures at the expiration of his term ;<sup>1</sup> and buildings, and machinery for the manufacture of shovels.<sup>2</sup>

*Growing crops.*—Grain growing is personalty, and may be levied on and sold as such, and the proceeds will go to the execution-creditor, not to a prior judgment-creditor.<sup>3</sup> Nor will the property in grain growing pass by a sheriff's sale of the land.<sup>4</sup> And under a *levari facias* on a mortgage (the land being liable for the debt), the sheriff cannot levy on and sell grain growing.<sup>5</sup> Where a husband in fraud of his creditors conveys his life estate in land held in right of his wife, the creditors may levy on the growing crops as his property.<sup>6</sup>

*Chattels real.*—A lease for years may be sold on a *feri facias* without inquisition and condemnation, that is, as personal and not real property.<sup>7</sup> But not a lease *pur auter vie*.<sup>8</sup> And where tenant for years had assigned his lease, to take effect at a future day, before judgment entered against him, though the assignment *in futuro* passed the property, yet his remaining interest prior to the day when the assignment should take effect is the subject of levy and sale ; and so is his interest in the valuation of the buildings at the expiration of the term.<sup>9</sup>

And a lessee's interest in either personal or real estate may be taken in execution.<sup>10</sup>

*Real property.*—There are two cardinal points of difference between execution of land, under our Acts of 1700<sup>11</sup> and 1705,<sup>12</sup> and execution of it under the Statute Westminster 2. In England for execution purposes, a judgment binds the lands as a specific thing ; but with us, the debtor's title or estate in it is bound without regard to whether he was seised or disseised at the time of the rendition : there, an owner disseised is not the tenant of the freehold, or, in contemplation of law, an owner at all, his estate being turned to a mere right which cannot be bound as a subject of execution ; here, whether the debtor was seised or disseised, a judgment binds every immediate interest vested in him which amounts to an estate, perfect or inchoate : again, land is taken in execution under the English statute and *delivered specifically* to the creditor to make satisfaction by the profits of it, without regard to the debtor's title to it ; under our statutes, the sheriff *sells*, not the land as the incontestable property of the debtor, but his estate in it or title to it *as a chattel*, and at the risk of the purchaser, who takes his chance of recovering on it against whomsoever may be in possession under an adverse title.<sup>13</sup>

Under the Act of 1705, all possible titles, contingent or otherwise,

<sup>1</sup> White's Appeal, 10 Barr 252.

<sup>2</sup> Church v. Griffith, 9 Ibid. 118.

<sup>3</sup> Stambaugh v. Yeates, 2 Rawle 161.

<sup>4</sup> Myers v. White, 1 Ibid. 353 ; Stambaugh v. Yeates, 2 Ibid. 161.

<sup>5</sup> Myers v. White, 1 Ibid. 353.

<sup>6</sup> Stehman v. Huber, 9 Harris 260.

<sup>7</sup> Dalzell v. Lynch, 4 W. & S. 256 ; Sowers v. Vie, 2 Harris 99 ; Williams v. Downing, 6 Ibid. 60 ; Sterling v.

Commonwealth, 2 Grant 162 ; see 8 Co. 171.

<sup>8</sup> Commonwealth v. Allen, 6 Casey 49. See post, "Levy on Life Estate."

<sup>9</sup> Williams v. Downing, 6 Harris 60.

<sup>10</sup> Lindsey v. Fuller, 10 Watts 147.

<sup>11</sup> 1 Sm. Laws 7.

<sup>12</sup> Ibid. 57.

<sup>13</sup> Mitchell v. Hamilton, 8 Barr 488, per GINSON, C. J.



in lands where there is a real interest, whether legal or equitable, may be taken in execution;<sup>1</sup> such as the interest of a tenant by the *curtesy initiate* in his wife's land<sup>2</sup> [though this is now altered by statute<sup>3</sup>]; or a vested remainder in tail;<sup>4</sup> or a rent-charge, or any other legal or equitable interest in lands,<sup>5</sup> as an executory devise;<sup>6</sup> or the interest of a vendee under articles, who has paid part of the purchase-money and taken possession of the land, but has not received a deed.<sup>7</sup> But after sale of unseated lands for taxes, and the expiration of the time allowed to redeem, the former owner has no interest which can be taken in execution.<sup>8</sup> Nor does it matter that the land is in the possession of a stranger, even holding under an adverse title,<sup>9</sup> or in the hands of defendant's voluntary assignee for the benefit of creditors;<sup>10</sup> and though the assignment of land for the benefit of creditors passes the legal title, which is not defeated by the neglect or refusal of the assignees to act, but vests in those appointed by the court to execute the trust; yet a trust results to the debtor by operation of law, which entitles him to the possession of the property remaining unconverted, and is such an interest as may be bound by a judgment against him, and may be the subject of levy and sale.<sup>11</sup>

If the lands are not situated in the county in which the proceeding purports them to be, the sale is void.<sup>12</sup> The property of a public corporation necessary to the existence and maintenance of the object for which it was created, is not the subject of levy and sale: such is a turnpike road<sup>13</sup> and a toll-house belonging to a canal company, though not on the ground appropriated as the site of the canal.<sup>14</sup> And a canal company by entering upon land and digging a canal which was never used, and paying damages therefor to the owner, acquired no right to the soil, but merely an easement which could be used by the company alone, and was not subject to levy and sale on execution.<sup>15</sup> But town lots held by a railroad company are not included in a mortgage of the road "with its corporate privileges and franchises," unless directly appurtenant to the railroad and indispensably necessary to the enjoyment of its franchises, and consequently may be levied on and sold in execution.<sup>16</sup>

<sup>1</sup> *Humphreys v. Humphreys*, 1 Yeates 427; *Hurst v. Lithgow*, 2 *Ibid.* 24; *Carkhuff v. Anderson*, 3 Binn. 4; *Thomas v. Simpson*, 3 Barr 60.

<sup>2</sup> *Burd v. Dansdale*, 2 Binn. 80, 91. Birth of issue is not necessary to give the husband an estate by curtesy: *Bank v. Stauffer*, 10 Barr 398.

<sup>3</sup> Act 1st April 1863, § 1, *Purd. Dig.* 1306, pl. 1, *Pamph. L.* 212.

<sup>4</sup> *Humphreys v. Humphreys*, 1 Yeates 429; 2 *Ibid.* 24; *Fuller v. McCall*, 2 Dallas 219.

<sup>5</sup> *Shaup v. Shaup*, 12 S. & R. 12; *Streaper v. Fisher*, 1 Rawle 162; *Rickert v. Madeira*, *Ibid.* 329.

<sup>6</sup> *De Haas v. Bunn*, 2 Barr 337.

<sup>7</sup> *Auwerter v. Mathiot*, 9 S. & R. 397; *Russell's Appeal*, 3 Harris 319.

<sup>8</sup> *Church v. Riddle*, 6 W. & S. 511.

<sup>9</sup> *Jarrett v. Tomlinson*, 3 W. & S. 114.

<sup>10</sup> *Neel v. Bank of Lewistown*, 1 Jones 18; *Thomas v. Lowber*, 2 Harris 438. In such case the title will be decided in a subsequent suit between the sheriff's vendee and the assignee: *Ibid.*

<sup>11</sup> *Webb v. Doan*, 9 Harris 29.

<sup>12</sup> *Kinter v. Jenks*, 7 Wright 445.

<sup>13</sup> *Ammant v. The President, &c.*, 13 S. & R. 210.

<sup>14</sup> *Susquehanna Canal Co. v. Bonham*, 9 W. & S. 27.

<sup>15</sup> *Spear v. Allison*, 8 Harris 200. The process against such corporations is the writ of sequestration.

<sup>16</sup> *Shamokin Railroad Co. v. Livermore*, 11 Wright 465.

But the rule does not apply to religious corporations, and a church with the lot on which it is built are private property, and subject in the same manner as other private property to levy and sale.<sup>1</sup> But not, perhaps, the burial-ground attached to the church.<sup>2</sup> And the lands and tenements of private corporations are liable to execution.<sup>3</sup> The real estate of a municipal corporation cannot be sold in execution.<sup>4</sup> The interest of a mortgagee in lands is not liable to execution before foreclosure of the equity of redemption;<sup>5</sup> nor the interest of an heir apparent;<sup>6</sup> and the creditors of one possessing a general power of appointment under the Statute of Uses, cannot take the property in execution before the grantee has appointed it to his own use.<sup>7</sup> And an oral bargain for the purchase of real estate does not vest in the vendee such an interest as may be taken in execution, unless the contract is partly executed;<sup>8</sup> and payment of purchase-money is not a part execution of such bargain.<sup>9</sup> But delivery of possession in pursuance of a parol contract amounts to a part performance.<sup>10</sup> And the interest of one of several purchasers of land, having given their joint bonds representing each one's share of the purchase-money, to one of their number in whom the legal title was vested as their trustee, is not the subject of levy and sale when he has paid no portion of his bond, and no equity arises out of such transaction tangible for a judgment-creditor to seize and sell.<sup>11</sup> And where a partnership was established to deal in lands, the estate of a single partner, not being a tenancy in common in the lands themselves, but only a resulting interest in the proceeds, is not subject to levy and sale under a judgment for his separate debt.<sup>12</sup> So land bought for partnership purposes and paid for out of partnership funds, is partnership property, though conveyed to the partners to hold as tenants in common.<sup>13</sup>

But by a doctrine applied with great liberality in this State, a testator or grantor may so settle real estate as to secure it to the object of his bounty free from execution. In the first case in which this question arose, a testator directed his executors to purchase a tract of land, to be conveyed to them in trust for his son, who was to have the rents, issues, and profits thereof; but the same not to be liable for any debts contracted, or which may be contracted, by him; and at his death, the land to vest in the heirs of his body in fee; and if he should die without heirs of his body, then the land to vest in the right heirs of the testator; and the executors purchased land, which was settled according to the trusts of the will. It was held, that the son had not such an interest in the land as could be taken

<sup>1</sup> *Presbyterian Congregation v. Colt's Executors*, 2 Grant 75.

<sup>2</sup> *Ibid.* 76, per LOWRIZ, J.

<sup>3</sup> Act 16th June 1836, § 72, *Purd. Dig.* 199, pl. 37-41, *Pamph. L.* 775. And see *post*, Sect. VII.

<sup>4</sup> *Wilson v. Commissioners*, 7 W. & S. 200; *Schaffer v. Cadwallader*, 12 Casey 125. And see *post*, sect. VII.

<sup>5</sup> *Rickert v. Madeira*, 1 Rawle 329; *Asay v. Hoover*, 5 Barr 35.

<sup>6</sup> *Humphreys v. Humphreys*, 1 Yeates 427.

<sup>7</sup> *Shay v. Sessaman*, 10 Barr 433, per GIBSON, C. J.

<sup>8</sup> *Miller v. Specht*, 1 Jones 449.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Reed v. Reed*, 2 Jones 117; *Pugh v. Good*, 3 W. & S. 56.

<sup>11</sup> *Deitzler v. Michler*, 1 Wright 82.

<sup>12</sup> *Kramer v. Arthurs*, 7 Barr 165.

<sup>13</sup> *Abbott's Appeal*, 14 Wright 234.

in execution, and sold for his debts.<sup>1</sup> And so in a subsequent case, a testator devised certain lots of ground to his son in fee, and in the last clause of the will gave the same to trustees in fee, in trust, during the son's natural life, to pay the rents arising therefrom to the son or his appointees, and to transfer the same at the son's death to his appointees by will, or, in default of such appointment, to his heirs under the Intestate Act, with power to sell and reinvest the proceeds, or to convey to the son, provided he should be relieved from embarrassment; it was held, that the son had no estate in the land liable to execution under a *fi. fa.*<sup>2</sup>

A devise to testator's son of a lot of ground at a valuation to be made after the death of the widow, with a devise of the residue including this valuation to all the children—the son being one—vests an interest in the son which may be levied on and sold.<sup>3</sup> So a devise to one of \$1000, more than one-fifth of testatrix's whole estate, to be paid out of the remaining four-fifths, together with a devise of such four-fifths to other heirs, passes such an estate to the first-named devisee as can be levied on and sold, although testatrix directed that the land should not be sold without the consent of all the heirs.<sup>4</sup> But land devised to executors to be sold and the proceeds to be divided amongst the legatees, is not the subject of a lien or execution against the legatees: but they may elect to take the land instead of its proceeds, and after such election it becomes the subject of lien and may be sold in execution.<sup>5</sup> But if there is an election a judgment-creditor of a devisee cannot make it.<sup>6</sup> And a devise to grandchildren, "provided" that their father "have the privilege of living on the place with his children during his life," gives but a license to the father, not liable to judgment and execution.<sup>7</sup>

Where the testator directed that the residue of his estate, except a house devised to his widow till his son should become of age, should descend as under the Intestate Laws, such interest of the widow, whether under the Intestate Laws or as devisee, is the subject of levy and judicial sale.<sup>8</sup>

In Pennsylvania, the widow's right of dower is nothing more than a right of action or title inchoate, or initiate at least, an interest repeatedly ruled to be subject to execution.<sup>9</sup> And prior to the Act of 1848, the interest of a second husband in his wife's estate in her first husband's land, was liable to execution.<sup>10</sup>

A conveyance of land in trust for grantor and wife during life, remainder to children, cannot be avoided by a subsequent creditor with record-notice of the trust-deed, and the latter cannot levy on

<sup>1</sup> Fisher v. Taylor, 2 Rawle 33, Todd, J., dissenting; see Eyrick v. Hetrick, 1 Harris 491; and see also Ashurst v. Given, 5 W. & S. 323, which were cases where the debts were prior to the deed.

<sup>2</sup> Vaux v. Parke, 7 W. & S. 19; see Norris v. Johnston, 5 Barr 289.

<sup>3</sup> Hart v. Homiller, 8 Harris 248.

<sup>4</sup> Lentz v. Lamplugh, 2 Jones 344.

<sup>5</sup> Stuck v. Mackey, 4 W. & S. 196.

<sup>6</sup> Gally's Estate, O. C. Phila., 22 Leg. Int. 365.

<sup>7</sup> Calhoun v. Jester, 1 Jones 474.

<sup>8</sup> Thomas v. Simpson, 3 Barr 60.

<sup>9</sup> Ibid. 71; Bachman v. Chrisman, 11 Harris 162.

<sup>10</sup> Bachman v. Chrisman, 11 Harris 162.

and sell the land on the ground that it was intended to delay, defraud, or hinder creditors.<sup>1</sup>

*Fraudulent conveyances by defendant.*—A mere expectation of future indebtedness or an intent to contract debts, not coupled with a purpose to convey the property to keep it from the reach of creditors, is not within the Statute 13 Eliz., and will not avoid the conveyance as to subsequent creditors;<sup>2</sup> to have this effect a voluntary deed must appear to have been made in contemplation of future indebtedness.<sup>3</sup> The rule as to antecedent creditors is more stringent, and a voluntary conveyance made by one who is at the time indebted, with intent to delay, hinder, or defraud creditors, is void as to them, and in general the intent will be presumed from the circumstance that the grantor is indebted.<sup>4</sup> So if the consideration is greatly inadequate to the value of the land, it is evidence of fraud as to antecedent creditors;<sup>5</sup> but even though the consideration is adequate, yet the existence of an intention on the part of the grantor to "delay, hinder, or defraud" creditors, will render the conveyance void.<sup>6</sup>

But the mere existence of indebtedness at the time of the conveyance will not avoid a voluntary deed, unless the debt bears such proportion to the property conveyed as may render its payment doubtful.<sup>7</sup> A conveyance by a father to his sons in consideration of their agreement to pay his debts, amounting to the full value of the property, is not voluntary, but for a valuable consideration.<sup>8</sup> The rule as to personal property, that retention of possession by the vendor is fraud in law, does not apply to real estate.<sup>9</sup> A conveyance fraudulent as to creditors is valid as between the parties, their executors and administrators,<sup>10</sup> and against a subsequent purchaser who has had notice of it.<sup>11</sup> And a *bond fide* purchaser from the fraudulent grantee, for a valuable consideration, is protected.<sup>12</sup>

<sup>1</sup> Snyder v. Christ, 3 Wright 499.

<sup>2</sup> Ibid.; Preston v. Jones, 14 Wright 55.

<sup>3</sup> Waterson v. Wilson, 1 Grant 74.

<sup>4</sup> Gilmore v. N. A. Land Co., 1 P. C. C. 460, 464; Rundle v. Murgatroyd, 4 Dall. 304; Thompson v. Dougherty, N. P., 12 S. & R. 448, per DUNCAN, J.; Johnston v. Harvey, 2 Pa. R. 92; Geiger v. Welsh, 1 Rawle 349; Hamet v. Dundass, 4 Barr 178; Bradley's Est., 1 Ash. 212; Hack v. Stewart, 8 Barr 213; Kepner v. Burkhardt, 5 Ibid. 478.

<sup>5</sup> Hamet v. Dundass, 4 Barr 178; Gans v. Renshaw, 2 Ibid. 34; Moyer v. Shick, 3 Ibid. 242. And as to what consideration is sufficient, see United States v. Mertz, 2 Watts 406; Postens v. Postens, 3 W. & S. 132; Dubbs v. Finley, 2 Barr 398; Pattison v. Stewart, 6 W. & S. 72.

<sup>6</sup> Gans v. Renshaw, 2 Barr 34; Clemens v. Davis, 7 Ibid. 264; Ashmead v. Hean, 1 Harris 584; Zerbe v. Miller, 4 Ibid. 488. See Wilt v. Franklin, 1

Binn. 514; Dean v. Connelly, 6 Barr 239.

<sup>7</sup> Mateer v. Hissim, 3 Pa. R. 164, 166; Hart v. Hart, 5 Watts 106; Posten v. Posten, 4 Whart. 27; Chambers v. Spencer, 5 Watts 404; Miller v. Pearce, 6 W. & S. 97; Anonymous, 1 Wall. Jr. 107; Wilson v. Howser, 2 Jones 109.

<sup>8</sup> Pattison v. Stewart, 6 W. & S. 72; Shontz v. Brown, 3 Casey 123; Stafford v. Stafford, 3 Ibid. 144; Preston v. Jones, 14 Wright 66.

<sup>9</sup> Allentown Bank v. Beck, 13 Wright 394.

<sup>10</sup> Hartley v. McNulty, 4 Yeates 95; Church v. Church, Ibid. 280; Reichart v. Castator, 5 Binn. 109; Sherk v. Endress, 3 W. & S. 255; Worrall's Accounts, 5 W. & S. 113; Dannels v. Fitch, 8 Barr 495; Moser v. Mayberry, 7 Watts 14; Murphy v. Hubert, 4 Harris 50.

<sup>11</sup> Foster v. Walton, 5 Watts 379; Dougherty v. Jack, Ibid. 456.

<sup>12</sup> Thompson v. McKean, 1 Ash. 129; Hood v. Fahnestock, 8 Watts 489.

The proper and most effectual way in which a creditor can defeat and frustrate covinous transfers of property, is to levy on and sell it, and then contest the right with the person claiming title.<sup>1</sup> And where a husband in fraud of his creditors conveyed his life estate in his wife's land, the creditors may levy on the growing crops as his property.<sup>2</sup>

Judgment-creditors of a trustee are not in the position of purchasers without notice, and cannot hold against the *cestui que trust*: the insolvency of the trustee at the creation of the trust does not disqualify him; nor is that fact any evidence that the trust was but a cover to defraud his creditors.<sup>3</sup>

*Estate of a married woman.*—Since the Acts of 11th April 1848<sup>4</sup> and 22d April 1850,<sup>5</sup> a creditor of a husband has no right to levy on the wife's real estate, and may be restrained by injunction; but in order to warrant the interference of a court of equity, a clear title in the wife must be made out.<sup>6</sup> Where the wife claims against the sheriff's vendee of land which has been sold under an execution against her husband, if the property has been acquired since the marriage, she must establish by clear and full proof that she paid for it with her own separate funds—it is not enough that she had the means of paying.<sup>7</sup> And the mere possession of money by her is no evidence of her title to it for the purposes of the statute; it ordinarily implies that she is holding it for her husband.<sup>8</sup>

But the fact that he has joined with her in a mortgage to secure the purchase-money, will not give him any legal or equitable estate in the land.<sup>9</sup> Where the marriage took place before the Act of 1848, the estate of the husband became vested, and that act was not intended to divest it.<sup>10</sup> And a creditor who had commenced suit against the husband prior to that act, might proceed under his judgment against the husband's estate in his wife's land, after the passage of the act.<sup>11</sup>

But by the Act of 22d April 1850, the husband's estate by curtesy in his wife's land, does not render such land subject to execution by his creditors during her life.<sup>12</sup> And now, no judgment obtained against the husband before or during the marriage will bind her real estate, or his curtesy therein.<sup>13</sup>

<sup>1</sup> *Neel v. Bank*, 1 Jones 18, per Coulter, J.; *Stewart v. Coder*, Ibid. 94, per Rogers, J.

<sup>2</sup> *Stehman v. Huber*, 9 Harris 260.

<sup>3</sup> *Shryock v. Waggoner*, 4 Casey 430.

<sup>4</sup> *Purd. Dig.* 699, pl. 11–15, Pamph. L. 536.

<sup>5</sup> *Purd. Dig.* 700, pl. 16, Pamph. L. 553.

<sup>6</sup> *Hunter's Appeal*, 4 Wright 194; *Baringer v. Stiver*, 13 Ibid. 129.

<sup>7</sup> *Keeney v. Good*, 9 Harris 355; *Hoar v. Axe*, 10 Ibid. 381; *Bradford's Appeal*, 5 Casey 515; *Auble's Adm'r. v. Mason*, 11 Ibid. 261; *Walker v. Reamy*, 12 Ibid. 410; *Black v. Nease*, 1 Wright

433; *Rhoads v. Gordon*, 2 Ibid. 277; *Kline's Appeal*, 3 Ibid. 463; *Aurand v. Schaffer*, 7 Ibid. 363; *Conrad v. Shomo*, 8 Ibid. 193; *Gault v. Saffin*, Ibid. 307; *Tripner v. Abrahams*, 11 Wright 221.

<sup>8</sup> *Parvin v. Capewell*, 9 Wright 89.

<sup>9</sup> *Conrad v. Shomo*, 8 Ibid. 193.

<sup>10</sup> *Bachman v. Chrisman*, 11 Harris 162. See *Lefever v. Witmer*, 10 Barr 505; *Peck v. Ward*, 6 Harris 509, per Black, C. J.

<sup>11</sup> *Lefever v. Witmer*, 10 Barr 505.

<sup>12</sup> Act 22d April 1850, §20, *Purd. Dig.* 700, pl. 16, Pamph. L. 553.

<sup>13</sup> Act 1st April 1863, §1, *Purd. Dig.* 1306, pl. 1, Pamph. L. 212.

A gift from husband to wife without the intervention of a trustee is valid, and will be sustained if it be no more than a reasonable provision for her proportioned to his circumstances at the time, and not hurtful to his creditors: but a conveyance that denudes the husband of all or the greater part of his property, is much more than a reasonable provision for her: therefore, the purchase-money of land, which the wife claimed to have been a gift from her husband, being attached in the hands of the purchaser, were awarded to creditors of the husband.<sup>1</sup> So a conveyance to her to secure the real estate to her, free from debts which he might contract in a new business in which he was about to engage, is of no effect against creditors who became such in the course of such business.<sup>2</sup> And a mere gift of money by the husband to the wife, is not a settlement of it as her separate estate.<sup>3</sup> A conveyance of land to a trustee for his wife is not to be overthrown upon presumptions merely: where the relation of the wife as creditor of the husband is clearly made out, her claim will be sustained.<sup>4</sup>

And where she has purchased real estate and given a mortgage for the purchase-money in which he has joined, the rents are not liable to execution at the suit of his creditors.<sup>5</sup>

But she must have paid for the land, a purchase on credit will not protect it: hence, where the wife purchased from the sheriff's vendee her husband's land, which had been sold in execution for a sum insufficient to pay the judgments, and gave a mortgage for the whole purchase-money, on which only interest was paid, the land is liable to execution at the suit of her husband's creditors.<sup>6</sup>

The declaration of the husband that certain property belonged to his wife, is not admissible as evidence in favor of the wife.<sup>7</sup> But the declarations of husband and wife, not relating to the original ownership of the money by her, but only to its transmission by her to her husband as a loan, evidenced by a note given by him to her trustee, occurring before any claims of creditors existed, are competent evidence.<sup>8</sup>

*After-acquired lands.*—Though a judgment is not a lien upon lands of the defendant subsequently acquired, yet the plaintiff may issue an execution and levy upon such lands in the possession of the defendant.<sup>9</sup> And in Philadelphia, after a levy on after-acquired land, the plaintiff may have the execution certified by the officer making such levy to the office of the court from which the execution issued; whereupon it is to be docketed on the judgment-index, and thenceforth binds the land levied on for five years.<sup>10</sup>

*Restricted judgment.*—If plaintiff in a judgment confessed, with

<sup>1</sup> Coates v. Gerlach, 8 Wright 43; Townsend v. Maynard, 9 Ibid. 198. See Goff v. Nuttall, 8 Wright 78.

<sup>2</sup> Black v. Nease, 1 Ibid. 433; Mul-len v. Wilson, 8 Ibid. 413, and cases there cited.

<sup>3</sup> Parvin v. Capewell, 9 Wright 89.

<sup>4</sup> Tripner v. Abrahams, 11 Ibid. 221.

<sup>5</sup> Goff v. Nuttall, 8 Ibid. 78.

<sup>6</sup> Baringer v. Stiver, 13 Ibid. 129.

And see the cases commented on in the opinion of the court; Ibid.

<sup>7</sup> Parvin v. Capewell, 9 Wright 89.

<sup>8</sup> Townsend v. Maynard, Ibid. 198.

<sup>9</sup> 3 Griffith's L. R. 250; Packer's Appeal, 6 Barr 277; Lea v. Hopkins, 7 Barr 492.

<sup>10</sup> Act 20th April 1853, § 9, *Purd.* Dig. 440, pl. 57, *Pamph. L.* 611.

an agreement restricting its lien to a certain specified tract, attempts, in violation of his agreement, to levy on other lands of defendant, the court will set aside the writ on motion.<sup>1</sup>

*Lands of decedents.*—Lands of deceased persons are also considered as assets for the payment of debts, and although they do not actually go into the hands of the executor or administrator as assets in the ordinary way, yet the former practice was that they might be taken and sold under execution for payment of debts on a judgment against the executor or administrator, for it was thought unnecessary, as well as unusual, to bring the action against the heir;<sup>2</sup> and Gibson, J., took an early opportunity to lament the consequences of a procedure where the representative only can be sued, and after judgment the lands may be levied upon in the hands of the heir.<sup>3</sup> Lands could be seized on a judgment against the executor, who need do no more than discharge himself of eventual liability in respect to the personal assets; and it became common to pray judgment of the land after the executor had discharged himself on a *plene administravit*.<sup>4</sup> Lands could, therefore, be taken in execution for debt in the hands of a purchaser from the heir or devisee; and as to lands thus taken in execution after the death of the debtor, the widow was barred of her dower under our Acts of Assembly.<sup>5</sup> Since these decisions, however, the Act of February 24th 1834, § 34,<sup>6</sup> directed, that in all actions against executors or administrators of a decedent who shall have left real estate, where the plaintiff intends to charge such real estate with the payment of his debt, the widow and heirs, or devisees, and the guardians of such as are minors, shall be made parties thereto; and in case such widow and heirs, or devisees, and their guardians, reside out of the county, it shall be competent for the court to direct notice of the writ issued therein, to be served by publication or otherwise, as such court may determine by rule of court; and if notice of such writ shall not be served on such widow and heirs, or devisees, and their guardians, the judgment obtained in such action shall not be levied or paid out of the real estate of such widow, heirs, or devisees, as shall not have been served with notice of such writ.<sup>7</sup>

What is the proper practice for the purpose of thus charging land with the decedent's debts will be considered in the next volume.

*Land aliened after the judgment* may be taken in execution while the lien of the judgment continues. But if the lien expires between the levy and the sale, the purchaser takes no title.<sup>8</sup> Opening and closing the judgment will not prolong the lien.<sup>9</sup> If process be issued at so late a day that execution of the estate cannot be had in the lifetime of the lien, it ought to be accompanied by a *scire facias* which will have the effect of preserving the lien.<sup>10</sup>

<sup>1</sup> Snevely v. Tarr, D. C. Phila., 1 Phila. Rep. 220.

<sup>2</sup> See Guier v. Kelly, 2 Binn. 298; Cowden v. Brady, 8 S. & R. 508, 457.

<sup>3</sup> Fritz v. Evans, 13 Ibid. 14.

<sup>4</sup> Himes v. Jacobs, 1 Pa. R. 158.

<sup>5</sup> Lyle v. Foreman, 1 Dallas 483-4.

<sup>6</sup> Pamph. L. 80.

<sup>7</sup> Nass v. Vanswearingen, 7 S. & R. 195.

<sup>8</sup> Gloninger v. Hazard, C. P. Phila., 4 Phila. Rep. 354.

<sup>9</sup> Ibid.

<sup>10</sup> Davis v. Ehrman, 8 Harris 259, per Woodward, J.

Where a tract of land bound by a judgment was conveyed in parcels at different times, the plaintiff in the judgment is restrained from levying at his pleasure on any one of such parcels, and compelled to proceed in a certain order against them. The rule is, that the parcels are liable in the inverse order of the conveyances, that is, the creditor must proceed first against the part last sold, and so on: but the equity of the earlier grantee is for his own protection solely, and arises from his payment of the purchase-money; and if he has not paid all the purchase-money he has no such equity, but must contribute, to the extent of his unpaid purchase-money, to a subsequent grantee whose land has been sold to pay the common lien.<sup>1</sup> And where, after aliening one of two tracts bound by a judgment, another judgment is entered against the vendor, the vendee has an equity so far superior to the subsequent judgment-creditor, that the latter cannot compel the first judgment-creditor to come first upon the lot thus conveyed, so as to leave the residue of vendor's estate to satisfy the second judgment.<sup>2</sup> And the court will not willingly listen to a motion to quash a *venditioni* on the ground that other property, conveyed by defendant after the judgment, and liable to contribute, might have been levied on; it would seem reasonable in such case that the moving party should have notified the plaintiff of the existence of such lands, so that he might have included them in his levy.<sup>3</sup> And the same general rule applies to lands bound by a mortgage conveyed in parcels.<sup>4</sup> The plaintiff may proceed against land bound by the judgment, in the hands of an alienee of defendant, without resorting to a *scire facias* against the terre-tenants.<sup>5</sup>

*Life estate.*—Under the Acts of 16th June 1836, and 13th October 1840,<sup>6</sup> a life estate in improved lands, yielding rents, issues and profits, was not the subject of levy and sale in execution.<sup>7</sup> The process provided by the Act of 1840, was a writ of sequestration, which will be more particularly explained hereafter.<sup>8</sup> But by the Act of 24th January 1849, sales of such life estates may be made in the manner provided by law, in the case of estates of inheritance, in all cases where some lien-creditor shall not, on or before the return day of the first writ of *venditioni exponas* whereon a sale shall be advertised, have procured a sequestrator to be appointed.<sup>9</sup>

A lease *per auter vie* is within the act, and cannot be sold on a *fi. fa.*, but only under a *venditioni exponas*, which must issue by direction of the court, and after notice to the tenant for life.<sup>10</sup>

<sup>1</sup> Beddow v. Dewitt, 7 Wright 326.

<sup>2</sup> Bruner's Appeal, 7 W. & S. 269.

See Zeigler v. Long, 2 Watts 206;

Cowden's Estate, 1 Barr 267. And

see *post*, Sect. IV., "Manner of Levy."

<sup>3</sup> 1 Peters's Rep. 140.

<sup>4</sup> Mevey's Appeal, 4 Barr 80; Cowden's Estate, 1 Ibid. 279, affirming Nailer v. Stanley, 10 S. & R. 450, which was shaken by Corporation v. Wallace, 3 Rawle 109. And see Bank of Pennsylvania v. Winger, 1 Ibid. 303; Fluck v. Replogle, 1 Harris 405. See *post*, Sect. IV., "Levy," Sect. VI.,

"Proceedings on Restricted Judgments."

<sup>5</sup> Young v. Taylor, 2 Binn. 228.

<sup>6</sup> Purd. Dig. 443, pl. 81-83, Pamph. L. 3.

<sup>7</sup> Dennison's Appeal, 1 Barr 201;

Parget v. Stambaugh, 2 Ibid. 285;

Eyrick v. Hetrick, 1 Harris 488.

<sup>8</sup> *Vide post*, Sect. VI., "Levy on Life Estates."

<sup>9</sup> Purd. Dig. 443, pl. 84-86, Pamph. L. 676. See Bachman v. Chrisman, 11 Harris 162.

<sup>10</sup> Commonwealth v. Allen, 6 Casey 49.



Where a husband conveyed in fraud of his creditors his life estate in his wife's land, the creditors may levy on the growing crops as his property.<sup>1</sup>

Upon a principle analogous to that just mentioned in the case of lands aliened at different times, the life estate is to be first called upon and exhausted to pay taxes and the interest of encumbrances, before the estate of the remainder-man or reversioner can be resorted to.<sup>2</sup>

*Of exemption from execution.*—Acts of Assembly have been passed from time to time with the design of securing indigent debtors against oppression on the part of their creditors. The modes in which this object has been sought to be accomplished are various, but we have here only to do with one of them—the exemption of certain descriptions of property from levy and sale in execution.

The Act of 9th April 1849 supplies all former acts so far as regards executions issued upon any judgment obtained upon contracts, and distress for rent. This act has been repeatedly held to be confined, in cases of judgments, to those obtained upon contracts;<sup>3</sup> and as by the 5th section, the former Acts of 1836 and 1846 are expressly repealed, as well as all other acts inconsistent with this, it was forcibly argued in *Lane v. Baker* that there is now no exemption in this State on executions upon judgments obtained in actions of tort; it became unnecessary, however, to decide the point so raised, and the court pointedly declined to give any opinion upon it. As this point has never yet been decided, we feel bound to present the older statutes, as they may still be in force so far as they are not supplied by the Act of 1849, that is, so far as they extend to executions upon judgments in actions *ex delicto*.

The Acts of 1836 and 1846 are, however, not affected by the Act of 1849, as regards debts contracted prior to July 4th 1849.<sup>4</sup>

*The Act of 1836* exempts from execution for any debt contracted since September 1st 1828, and also for any damages recovered since that day, except damages for injury done to real estate, the following articles owned by or in the possession of the debtor, viz.: I. Household utensils, not exceeding in value thirty dollars. II. The necessary tools of a tradesman, not exceeding in value thirty dollars. III. All wearing apparel in possession of the debtor or his family. IV. Four beds and the necessary bedding. V. A spinning-wheel and reel. VI. A stove, with the pipe of the same, and necessary fuel for three months. VII. One cow, two hogs, also six sheep, with the wool thereof, or the yarn or cloth manufactured therefrom, and feed sufficient for the said cow, hogs, and sheep, from the first day of November until the last day of May. VIII. Any quantity of meat not exceeding two hundred pounds, twenty bushels of potatoes, ten bushels of grain, or the meal made therefrom. IX. Any

<sup>1</sup> *Stehman v. Huber*, 9 Harris 260.

<sup>2</sup> *McDonald v. Heylin*, D. C. Phila., 4 Phila. Rep. 73.

<sup>3</sup> *Lauck's Appeal*, 12 Harris 428, per *Lewis, C. J.*; *Lane v. Baker*, 2 Grant 424; *Gangwere's Appeal*, 12 Casey

469, per *WOODWARD, J.*; *Waugh v. Burket*, 3 Grant 319, per *WOODWARD, J.*

<sup>4</sup> Act 14th April 1851, § 17, Pamph. L. 616; *Mardis v. Clarke*, 7 Harris 386; *Springer v. Lewis*, 10 *Ibid.* 191.

quantity of flax not exceeding ten pounds, or the thread or linen made therefrom. X. All bibles and school-books in the use of the family.<sup>1</sup>

*The Act of 1846* exempts the necessary tools of a tradesman from levy and sale by virtue of any warrant and execution;<sup>2</sup> and, in addition to the property previously exempt from levy and sale by virtue of any execution or distress for rent, exempts the following property when owned by any person actually engaged in the science of agriculture, viz.: one horse, mare, or gelding, not exceeding in value fifty dollars, one set of horse-gears and one plough, or, in lieu thereof, one yoke of oxen, with yoke and chain, and one plough, at the option of the defendant.<sup>3</sup>

The property exempt under the Act of 1836 need not be owned by the defendant; it is sufficient if it be in his possession with the right to use it for his own benefit.<sup>4</sup> Hence where a debtor had in his possession two cows, one owned by him and the other held upon a lease at an annual rent, the one owned by him might be levied on and sold; the election belongs to the officer.<sup>5</sup> And where defendant was in possession of two cows, one of which he alleged was the property of another person, but the question of property was made doubtful by the debtor, the sheriff was not liable in trespass for selling the other cow.<sup>6</sup>

Where the defendant consented to a levy on articles exempt by this act, it was competent for him to withdraw such consent before the day of sale.<sup>7</sup>

A manufacturer is not a tradesman, under the Act of 1846, so as to exempt his machinery as tools.<sup>8</sup> Where one engaged in agriculture had in his possession two yoke of oxen, one yoke of which he had sold, but had received back the possession of them the same day to break them for the vendee, though this sale was void as to creditors, it was valid as to the vendor and divested his title: and therefore the other yoke still owned by him was protected by the Act of 1846 from levy and sale.<sup>9</sup> One who keeps a tavern and boarding-house, and works at his trade as a tailor in the winter, may also be a person "actually engaged in the science of agriculture," within the meaning of the act: a person is "actually engaged in the science of agriculture," when he derives the support of himself and family, in whole or in part, from the tillage of fields; he must cultivate something more than a garden, though it may be much less than a farm.<sup>10</sup>

The time to which the inquiry as to the debtor's occupation relates, is the time of the levy; hence a tenant on a farm who has declared his intention to leave at the expiration of his lease, is entitled to the exemption given by the act until his lease has expired.<sup>11</sup>

<sup>1</sup> Act 16th June 1836, § 26, Pamph. L. 765.

<sup>2</sup> Act 22d April 1846, § 7, Pamph. L. 476.

<sup>3</sup> *Ibid.*, § 8.

<sup>4</sup> *Lindsey v. Fuller*, 10 Watts 147, per KENNEDY, J.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Trevillo v. Shingles*, 10 Watts 438.

<sup>7</sup> *Hutchinson v. Campbell*, 1 Casey 273.

<sup>8</sup> *Richie v. McCauley*, 4 Barr 471.

<sup>9</sup> *Hetrick v. Campbell*, 2 Harris 263.

<sup>10</sup> *Springer v. Lewis*, 10 *Ibid.* 191.

<sup>11</sup> *Ibid.*

Under these acts the defendant's remedy, in case the officer seized in execution exempted property, was by action of trespass against the officer.

The acts prior to the Act of 1836 are in general confined to debts and rent, and therefore are clearly repealed by the 5th section of the Act of 1849; they may be found collected in the case of *Lane v. Baker*,<sup>1</sup> to which reference has already been made.

*Militia*.—Every officer and soldier of the militia shall hold his uniform, arms, ammunition, and accoutrements, required by law, free from all suits, distresses, executions, or sales for debt or payment of taxes.<sup>2</sup>

The Act of 9th April 1849 supplies and repeals all former acts, so far as regards executions issued upon any judgment obtained upon contract, and distress for rent.<sup>3</sup> The exemption given by this act is confined to executions upon judgments obtained in actions *ex contractu* as distinguished from actions *ex delicto*.<sup>4</sup> But a judgment against plaintiff for costs, though in an action of tort, is not a judgment on a tort, but a debt, and the debtor may claim the exemption.<sup>5</sup>

An execution on a judgment on an attachment under the 27th section of the Act of 12th July 1842,<sup>6</sup> is subject to exemption if the original judgment were on a contract.<sup>7</sup>

A mechanic's lien, which is a proceeding *in rem*, is not a contract within the meaning of the act, and the defendant cannot claim the exemption.<sup>8</sup> So where the sale is under an ordinary judgment, defendant cannot claim exemption as against mechanics' liens filed after the entry of the judgment.<sup>9</sup> And a mortgage is not a contract within the meaning of the act, and the mortgagor cannot claim the exemption against the mortgagee, in proceedings either on the mortgage or on the bond accompanying it.<sup>10</sup> But he can claim it out of the surplus proceeds, remaining after the satisfaction of the mortgage, as against his judgment-creditors.<sup>11</sup>

And exemption cannot be claimed against bonds, mortgages, or other contracts, for the purchase-money of the real estate of insolvent debtors.<sup>12</sup>

A foreign attachment is not within the act for another reason; it is not an execution.<sup>13</sup> But an attachment-execution is within the

<sup>1</sup> 2 Grant 424.

<sup>2</sup> Act 4th May 1864, § 55, Pamph. L. 233.

<sup>3</sup> Sect. 1, 5. Purd. Dig. 432-4, pl. 20-24, Pamph. L. 533.

<sup>4</sup> Lauck's Appeal, 12 Harris 428, per LEWIS, C. J.; Gangwere's Appeal, 12 Casey 469, per WOODWARD, J.; Lane v. Baker, 2 Grant 424.

<sup>5</sup> Lane v. Baker, 2 Grant 424.

<sup>6</sup> Purd. Dig. 593, pl. 57, Pamph. L. 346. This section empowers a justice to issue an attachment against a defendant who is about fraudulently to remove, assign, or conceal his property.

<sup>7</sup> Waugh v. Burket, 3 Grant 319.

<sup>8</sup> Lauck's Appeal, 12 Harris 428.

<sup>9</sup> Building Association v. O'Conner, D. C. Phila., 3 Phila. R. 453.

<sup>10</sup> McAuley's Appeal, 11 Casey 209; Morgan v. Noud, D. C. Phil., 1 Phila. R. 250; Gangwere's Appeal, 12 Casey 466. Besides the mortgage itself is a perpetual waiver of exemption; Ibid., per WOODWARD, J.

<sup>11</sup> Hill v. Johnston, 5 Casey 362. See *contra*, Saving Fund v. Creighton, 3 Phila. R. 58.

<sup>12</sup> Act 9th April 1849, § 3, *proviso*, Purd. Dig. 433, pl. 22, Pamph. L. 533. Ulrich's Appeal, 12 Wright 489.

<sup>13</sup> Yelverton v. Burton, 2 Casey 351.

act, where the judgment on which it issues was founded on contract.<sup>1</sup>

A constable cannot claim exemption on an execution upon a judgment obtained against him for official misconduct or negligence.<sup>2</sup>

A *terre-tenant*, who purchased the land subject to the judgment under which it was afterwards sold, is not entitled to claim the exemption: he is not a "defendant," or a "debtor," within the meaning of the act.<sup>3</sup>

The act does not apply to executions issued out of the Federal courts.<sup>4</sup> Nor to warrants for the collection of taxes.<sup>5</sup>

A bachelor defendant is entitled to the exemption, though it is generally spoken of as intended for the benefit of the defendant's family.<sup>6</sup>

Joint debtors are not within the statute, and cannot claim the exemption of their joint property distrained for rent.<sup>7</sup>

*Debts contracted prior to the act.*—By the 5th section of the act it was provided that it should not take effect till July 4th 1849, and should only apply to debts contracted on and after that date.<sup>8</sup> Where the judgment was for a debt of which part had been contracted before, and part after the 4th of July 1849, the debtor could only have the benefit of the act by paying that part of the debt which was contracted previously to July 4th 1849, and claiming the benefit of the exemption as to the residue.<sup>9</sup> Where there were several judgments, some for debts contracted before July 4th 1849, others for debts contracted after that date, and one belonging to A. for debts contracted partly before and partly afterwards, the excess of the fund over \$300 was distributed first to the judgment-creditors in the order of their liens, then the \$300 was applied to the judgments for debts contracted prior to July 4th 1849, including the portion of A.'s judgment, which accrued prior to that date, and the balance of the \$300 was paid to the debtor, in preference to the judgments for debts contracted after that day.<sup>10</sup> Where, on a debt contracted before July 4th 1849, a new security or evidence of debt was given after that date, the debtor cannot claim the benefit of the act, upon the judgment on such new security.<sup>11</sup>

*What property is within the act.*—The exemption in executions applies to property *owned* by the defendant, and not to that he has merely in possession; the word "possession" in the act relates to distresses for rent.<sup>12</sup>

*Value and kind of property exempted.*—The words of the act are, "property to the value of three hundred dollars, exclusive of all wearing apparel of the defendant and his family, and all bibles

<sup>1</sup> Strouse's Executor v. Becker, 2 Wright 190; Same v. Same, 8 Ibid. 206.

<sup>2</sup> Kirkpatrick v. White, 5 Casey 176.

<sup>3</sup> Eberhart's Appeal, 3 Wright 509.

<sup>4</sup> Lloyd v. Yost, D. C. Phila., 4 Phila. Rep. 42.

<sup>5</sup> Act 9th April 1849, § 2.

<sup>6</sup> Dieffenderfer v. Fisher, 3 Grant 30.

<sup>7</sup> Bonsall v. Comly, 8 Wright 442.

<sup>8</sup> Act 9th April 1849, § 5, Purd. Dig. 434, pl. 24, Pamph. L. 534.

<sup>9</sup> Harleman v. Buck, 6 Casey 267.

<sup>10</sup> Smith's Appeal, 11 Harris 310.

<sup>11</sup> Reed v. Defebaugh, 12 Ibid. 495; Weaver's Estate, 1 Casey 434.

<sup>12</sup> Huey's Appeal, 5 Ibid. 219.

and school-books in use in the family (which shall remain exempted as heretofore), and no more."<sup>1</sup>

But one member of a partnership cannot claim out of partnership property, taken in execution for a partnership debt, specific articles to the value of three hundred dollars.<sup>2</sup>

The defendant is not, under any circumstances, entitled to the \$300 in money out of the proceeds of a sheriff's sale of his goods; the act confines him to an election *of the goods* he desires to retain.<sup>3</sup> And he has no right to elect goods to which he disclaims title, nor can he maintain trespass against the constable for selling such goods.<sup>4</sup>

But in case of real estate, where it is found impossible to set off a portion without prejudice to the whole, he may receive its equivalent in money out of the proceeds.<sup>5</sup> But he is not entitled to any of the proceeds if he fail to elect,<sup>6</sup> or if the sheriff sell the land in disregard of his claim.<sup>7</sup>

*When the defendant is allowed to take money.*—There seem to be but two cases where the debtor is allowed to take the amount of the exemption in money: one is, where it is found impossible to set off real estate of the proper value without prejudice to the whole;<sup>8</sup> the other is where the proceeding is under a mortgage, in which case no exemption is allowed as against the mortgagee, and the appraisement, if demanded and made, would be invalid, but the mortgagor may nevertheless claim the amount out of the proceeds as against judgments and liens which are subject to the exemption.<sup>9</sup> In all other cases, as where the debtor has omitted to claim the exemption,<sup>10</sup> or his claim is disregarded by the officer,<sup>11</sup> or he has waived the exemption, and consequently the appraisement in the judgment under which the sale is made,<sup>12</sup> he cannot be paid out of the proceeds to the prejudice of lien-creditors. The law allows him to keep the property, but does not give a right to the money produced by the sale.<sup>13</sup> But though the debtor cannot have money *in lieu* of goods levied on, yet, by the Act of 8th April 1859, he may elect to retain property to the value of three hundred dollars, or any part thereof, out of any bank notes, money, stocks, judgments, or other indebtedness to him, taken in execution.<sup>14</sup>

<sup>1</sup> Act 9th April 1849, § 1, Purd. Dig. 432, pl. 20, Pamph. L. 533. The amount thus exempted may be reserved in a deed of assignment for benefit of creditors, without avoiding the deed: *Mulford v. Shirk*, 2 Casey 473.

<sup>2</sup> *Clegg v. Houston*, D. C. Phila., 1 Phila. Rep. 352. See *Ferguson v. Moore*, D. C. Phila., 7 Leg. Int. 166; 1 Phila. Rep. 52, s. c.

<sup>3</sup> *Hammer v. Freese*, 7 Harris 255; *Knabb v. Drake*, 11 Harris 489.

<sup>4</sup> *Gilleland v. Rhoads*, 10 Casey 187.

<sup>5</sup> Act 9th April 1849, § 4, Purd. Dig. 433, pl. 23, Pamph. L. 534.

<sup>6</sup> *Miller's Appeal*, 4 Harris 300; *Weaver's Appeal*, 6 Ibid. 307; *Brant's Appeal*, 8 Ibid. 141; *Sennickson v.*

*Fulton*, D. C. Phila., 1 Phila. Rep. 220.

<sup>7</sup> *Marks's Appeal*, 10 Casey 36. It is only remedy in that case is against the sheriff: *Ibid.*

<sup>8</sup> Act 9th April 1849, § 4. *Knabb v. Drake*, 11 Harris 489.

<sup>9</sup> *Hill v. Johnston*, 5 Casey 362; *Shelly's Appeal*, 12 Ibid. 373.

<sup>10</sup> *Miller's Appeal*, 4 Harris 300; *Weaver's Appeal*, 6 Ibid. 307; *Brant's Appeal*, 8 Ibid. 141; *Sennickson v. Fulton*, D. C. Phila., 1 Phila. Rep. 220.

<sup>11</sup> *Marks's Appeal*, 10 Casey 36.

<sup>12</sup> *Bowman v. Smiley*, 7 Ibid. 225.

<sup>13</sup> *Winchester v. Costello*, 2 Par. 279.

<sup>14</sup> Purd. Dig. 434, pl. 26, Pamph. L. 425. See *Strouse v. Becker*, 8 Wright 206.

Where property has been once exempted, a new stock of goods purchased with the proceeds will be protected against an *alias* execution under the same judgment in which the former exemption was obtained.<sup>1</sup> But, as we shall see, exemption must be separately claimed on each successive writ issued on different judgments, and therefore if, after exemption of goods, they are converted into money, whether by sale of them by the defendant, or by recovery of damages in trespass for taking them, or where, on their destruction by fire after having been insured, a claim for their value exists against the insurance company, the former exemption of the goods will not protect the proceeds in the hands of a debtor of the defendant from levy, or attachment in execution.<sup>2</sup>

*The claim of exemption and demand of appraisement.*—The privilege is not an exemption from having the defendant's property sold, but a right to obtain an exemption in a designated manner, and he who would secure it must comply with the statute;<sup>3</sup> and even where his whole estate is less than \$300, he must claim his right, or he will lose it.<sup>4</sup> The defendant, or some one for him, must notify the officer making the levy of his intention to claim the benefit of the act, and request an appraisement of the property.<sup>5</sup> It was formerly doubted whether a wife could make a valid demand of exemption in the absence of her husband, and without his express authority;<sup>6</sup> but a claim in behalf of absent debtor by his wife and counsel is good;<sup>7</sup> and it is now held that in the temporary absence of the owner, any person left in charge of the premises, and especially a child of proper age, is authorized to claim the benefit of the act.<sup>8</sup> But a mere stranger, whose goods being on the premises, are *distraigned*, cannot make the claim for the benefit of the act, though he is a sub-tenant, or assignee of the original tenant, who has never been recognised as such by the landlord; but the original tenant may make the claim in order to protect his own goods and those of his sub-tenant.<sup>9</sup>

No particular form of notice and request is required by the act. It need not be in the words of the act, and may be made by parol to the sheriff when absent from his office.<sup>10</sup> Any words which will apprise the officer that the statutory exemption is the thing claimed by the notice or demand are sufficient.<sup>11</sup> A form of request for an appraisement will be found in Smith.<sup>12</sup> Where the apparent value of the goods levied on is less than the amount exempted by law, it is unnecessary to specify the articles in the demand for an appraisement.<sup>13</sup>

<sup>1</sup> Hanley v. O'Donald, 6 Casey 261. See Strouse v. Becker, 2 Wright 193, per WOODWARD, J.

<sup>2</sup> Knabb v. Drake, 11 Harris 489; Strouse v. Becker, 2 Wright 190; Same v. Same, 8 Ibid. 206.

<sup>3</sup> Line's Appeal, 2 Grant 197; Heron's Appeal, 5 Casey 240.

<sup>4</sup> Becker's Appeal, 3 Ibid. 52.

<sup>5</sup> Act 9th April 1849, § 2, Purd. Dig.

433, pl. 21, Pamph. L. 533.

<sup>6</sup> Yelverton v. Burton, 2 Casey 351.

<sup>7</sup> Waugh v. Burkett, 3 Grant 319.

<sup>8</sup> Wilson v. McElroy, 8 Casey 82.

<sup>9</sup> Rosenberger v. Hallowell, 11 Ibid. 369.

<sup>10</sup> Bowman v. Smiley, 7 Ibid. 225.

<sup>11</sup> Diehl v. Holben, 3 Wright 213.

<sup>12</sup> Sm. Forms 362, pl. 3.

<sup>13</sup> Wilson v. McElroy, 8 Casey 82.

A waiver of inquisition is not incompatible with a claim for exemption, and the two may be joined in the same paper.<sup>1</sup>

*Time of making the claim.*—The claim in case of personal property must be made before the sale, or it will be ineffectual;<sup>2</sup> but it seems it may be made on the day of sale if before the hour appointed;<sup>3</sup> but this is now qualified, and where the debtor is at hand at the time of the levy, or in circumstances reasonably convenient for the purpose, he is bound to make the claim before the plaintiff is put to the costs of any further proceeding.<sup>4</sup> So it is too late if made after the sale was advertised;<sup>5</sup> but four days before the sale is not too late when it is not shown that the debtor had earlier notice of the levy.<sup>6</sup> It must be made before the day of sale, and generally before the advertisements are put up, unless there are special circumstances, such as absence from home, or ignorance of the levy, to excuse delay.<sup>7</sup> On an attachment-execution it must be made in a reasonable time after the issue of the writ, and is too late if made by plea to the *scire facias*.<sup>8</sup>

In attachment-execution it is too late to make the claim on the trial of the issue between the attaching creditor and the garnishee.<sup>9</sup>

In the case of real property it must be made before the inquisition,<sup>10</sup> or before waiver of inquisition,<sup>11</sup> and in cases where no inquisition is required by law, the claim must be made before advertisement of the sale.<sup>12</sup> It is not allowable, if the necessary consequence will be to postpone the sale.<sup>13</sup> The defendant may, for good cause, ask an allowance of time for making his claim for exemption.<sup>14</sup>

*On what writs exemption must be claimed.*—Where several writs are in the sheriff's hands at the same time, one demand is sufficient against them all,<sup>15</sup> but the rule is different as to successive writs; here the debtor must make his claim in every execution issued against him,<sup>16</sup> even where the same person is plaintiff in different executions;<sup>17</sup> and the claim must in general be made on the writ which is the instrument of effecting the sale;<sup>18</sup> the exception to this is the case of a sale under proceedings on a mortgage.<sup>19</sup> But where the successive writs are on the same judgment, a claim made on the first writ will be valid against the second.<sup>20</sup> And where there was no waiver of exemption on the judgment under which the sale was made, the defendant had a right to claim it on the distribution (the

<sup>1</sup> Shaw's Appeal, 13 Wright 177.

<sup>2</sup> Hammer v. Freese, 7 Harris 255;

Rogers v. Waterman, 1 Casey 183.

<sup>3</sup> Rogers v. Waterman, 1 Casey 184.

<sup>4</sup> Dieffenderfer v. Fisher, 3 Grant 30.

<sup>5</sup> Kessel v. Kern, D. C. Phila., 4 Phila. Rep. 86. And so in distress for rent: Rosenberger v. Hallowell, D. C. Phila., 3 Ibid. 330.

<sup>6</sup> Kee v. Hobensack, D. C. Phila., 2 Phila. Rep. 82.

<sup>7</sup> Diehl v. Holben, 3 Wright 213.

<sup>8</sup> Strouse's Executor v. Becker, 8 Ibid. 206.

<sup>9</sup> Zimmerman v. Briner, 14 Ibid. 535.

<sup>10</sup> Miller's Appeal, 4 Harris 300; Brant's Appeal, 8 Ibid. 141; Bowyer's

Appeal, 9 Ibid. 210.

<sup>11</sup> Bowyer's Appeal, 9 Harris 210.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Elliott v. Flanigan, 1 Wright 425.

<sup>15</sup> Bechtel's Appeal, 2 Grant 375.

<sup>16</sup> Ibid.; Line's Appeal, 2 Grant 197;

Dodson's Appeal, 1 Casey 232; Strouse's

Executors v. Becker, 2 Wright 190;

Same v. Same, 8 Ibid. 206.

<sup>17</sup> Dodson's Appeal, 1 Casey 234, per Black, J.

<sup>18</sup> McAfoose's Appeal, 8 Casey 276;

Shelly's Appeal, 12 Ibid. 373.

<sup>19</sup> Ibid.; Hill v. Johnston, 5 Casey 362.

<sup>20</sup> McAfoose's Appeal, 8 Casey 276.

appraisers having reported that the land could not be divided), though judgments to a greater amount, with a waiver, were also presented before the auditor.<sup>1</sup>

*Appraisement.*—The officer executing the writ,<sup>2</sup> upon being requested by the debtor, or other proper person, must summon three disinterested and competent persons, who are to be sworn or affirmed, to appraise the property which the debtor may elect to retain under the act, which property, to the value of three hundred dollars, will be exempt from levy and sale under the execution or warrant.<sup>3</sup> The oath or affirmation may be administered to the appraisers, by the sheriff, deputy sheriff, or constable.<sup>4</sup> The debtor has no right to have appraised and set apart to him goods to which he disclaims ownership; such appraisement, if made, is merely void.<sup>5</sup> A waiver of the exemption is a waiver of the right to demand an appraisement.<sup>6</sup>

If the levy is on land worth more than three hundred dollars, and the debtor elects to retain real estate to the value of three hundred dollars, the appraisers are to determine whether, in their opinion, the land can be divided without prejudice to the whole; if so, they are to proceed to set apart to the debtor, by metes and bounds, so much as may be of sufficient value to answer his requirement, and certify their proceedings in writing, under their hands and seals, or those of a majority, to the officer having charge of the execution, who shall return the same, along with the writ, to the court whence the writ issued.<sup>7</sup> If the appraisers determine against a division of the land, the debtor may receive the amount of his execution out of the proceeds.<sup>8</sup> The provisions for the appraisement of a part of the land levied on do not affect or impair the liens of bonds, mortgages, or other contracts for the purchase-money of the real estate of insolvent debtors.<sup>9</sup> And where, in an execution upon a judgment for purchase-money, the defendant claimed the exemption, and the sheriff returned the demand and appraisement which were duly confirmed by the court, such proceedings being void, so far as concerned the judgments for purchase-money, the approval thereof by the court had no effect as an adjudication of the defendant's right, and the proceeds were to be applied to such judgments as if no exemption law existed.<sup>10</sup> And in proceedings by *levari facias* on a mortgage, the sheriff has no authority to hold an appraisement, though notified by the debtor to do so; but the want of an appraisement will not debar the debtor from claiming the benefit of the exemption out of the proceeds of sale as against judgments and liens which are subject to its provisions; the omission of the legislature to point out the mode of making the claim,

<sup>1</sup> Pittman's Appeal, 12 Wright 315.

<sup>2</sup> For this service the sheriff is allowed a fee of two dollars, the constable a fee of one dollar. Act 4th May 1852, §§ 3, 4, Purd. Dig. 458, pl. 17, 469, pl. 50, Pamph. L. 584.

<sup>3</sup> Act 9th April 1849, § 2, Purd. Dig. 433, pl. 21, Pamph. L. 533. See the Form of Appraisement and Return: Smith's Forms 363, pl. 4.

<sup>4</sup> Act 8th April 1857, § 1, Purd. Dig.

434, pl. 25, Pamph. L. 170.

<sup>5</sup> Gilleland v. Rhoads, 10 Casey 187.

<sup>6</sup> Bowman v. Smiley, 7 Ibid. 225.

<sup>7</sup> Act 9th April 1849, § 3. See the Forms of Request, Summons, and Return; Smith's Forms 364, pl. 5, 6, 7.

<sup>8</sup> Ibid. § 4. See the Form of Return; Smith's Forms 365, pl. 8.

<sup>9</sup> Ibid. § 3.

<sup>10</sup> Ulrich's Appeal, 12 Wright 489.



in proceedings upon a mortgage, does not annihilate the right conferred by the act.<sup>1</sup>

The court has power to set aside an appraisement for cause; it is ground for setting it aside that it was not conducted publicly;<sup>2</sup> so the court will interfere, upon motion supported by affidavits, and set aside an appraisement which is greatly below the market value of the property; and the application may be made at once, it is not necessary to wait for the sheriff's return.<sup>3</sup>

The time for the debtor to elect whether he will retain real or personal property is after the appraisers have been summoned.<sup>4</sup>

The claim, appraisement, and return do not give the debtor a right to the amount of the exemption where he was not otherwise entitled to it.<sup>5</sup>

*The sale of the land.*—Upon the return of the writ, with the proceedings thereon, the plaintiff, as in other cases, may have a *venditioni exponas* to sell the residue, if the appraisers have set off a part of the land to the defendant; or to sell the whole if the appraisers have decided against dividing the land.<sup>6</sup> A term must necessarily intervene between the appraisement and the sale.<sup>7</sup> The court will refuse to order a *venditioni* to issue for the sale of property which the sheriff returns as claimed to be exempt by the defendant, but as to which the sheriff refuses to decide; the plaintiff must proceed without the interposition of the court.<sup>8</sup> Such order, if made, would not protect the sheriff.<sup>9</sup>

*Disregard by the officer of the claim for exemption.*—If the officer disregards a claim, made in due time, the debtor loses his right to exemption, and the officer is liable to him in an action.<sup>10</sup> Either trespass or case lies; they are concurrent remedies.<sup>11</sup> A constable, refusing to permit the debtor to select and retain goods to the amount allowed by the act, becomes a trespasser *ab initio*;<sup>12</sup> no indemnity will save him harmless in thus disregarding the act; a bond or obligation given for such purpose is void.<sup>13</sup>

A justice of the peace has jurisdiction of an action against a constable for disregarding a claim for exemption.<sup>14</sup>

A waiver of the exemption will justify the officer in disregarding a claim;<sup>15</sup> so will unreasonable delay in making the claim, but the officer must show this;<sup>16</sup> and if he attach to the return, without explanation, a claim for exemption dated the day the *fi. fa.* came into his hands, it will be evidence that the demand was made in time, it being the rule to construe his return most rigorously against

<sup>1</sup> Hill v. Johnston, 5 Casey 362.

Phila. Rep. 221.

<sup>2</sup> Huddy v. Sproule, C. P. Phil., 4 Phila. Rep. 353.

<sup>9</sup> Ibid.

<sup>3</sup> Sleeper v. Nicholson, D. C. Phila., 1 Phila. Rep. 348.

<sup>10</sup> Hammer v. Freese, 7 Harris 255; Marks's Appeal, 10 Casey 36.

<sup>4</sup> Bowman v. Smiley, 7 Casey 225.

<sup>11</sup> Van Dresar v. King, Ibid. 201;

<sup>5</sup> Lauck's Appeal, 12 Harris 426.

Stamer v. Nass, 3 Grant 240.

<sup>6</sup> Act 9th April 1849, § 4, Purd. Dig. 433, pl. 23.

<sup>12</sup> Wilson v. Ellis, 4 Casey 238.

<sup>7</sup> Bowyer's Appeal, 9 Harris 210.

<sup>13</sup> Freeman v. Smith, 6 Ibid. 264.

<sup>8</sup> Ferguson v. Moore, D. C. Phila., 1 Phila. Rep. 92; Houston v. Smith, 1

<sup>14</sup> Stamer v. Nass, 3 Grant 240.

<sup>15</sup> Bowman v. Smiley, 7 Casey 225.

<sup>16</sup> Kee v. Hobensack, D. C. Phila., 2 Phila. Rep. 82.

him;<sup>1</sup> but where a part of defendant's goods, which had been appraised and set apart to him under an execution, were afterwards included in another levy, and he desired time to consult counsel as to the effect of the former appraisement before making a new election, and the sheriff appraised the goods, but refused the defendant the privilege of election out of the goods appraised, though demanded the next morning, and sold all the goods levied on, it was held that as the defendant had caused no delay nor increase of costs, he should have been permitted to make the election, and the sheriff was liable in damages for refusing such permission.<sup>2</sup> So, if the defendant disclaims title to a portion of the goods levied on, he has no right to have them appraised, and set apart to him, and the officer is not liable in trespass for selling them; the appraisement, as to them, is merely void.<sup>3</sup>

A debtor forfeits his right to exemption by falsely denying his ownership of property, and hindering the sheriff in proceeding in the execution:<sup>4</sup> but it was at first held that it was no defence to an action against an officer for disregarding a claim for exemption of goods levied on, that the debtor had other property, exceeding three hundred dollars in value, which he fraudulently withheld from the officer, and refused to permit him to levy on; but evidence of this fact may be given in mitigation of damages, and if proved the damages will be only nominal.<sup>5</sup> Now, however, such fraud on the part of the defendant is a complete bar to the action.<sup>6</sup>

Where the record shows that part of the debt on which the judgment is founded was contracted prior to July 4th 1849, the officer is not liable for levying and selling defendant's property in disregard of a *general* claim for an appraisement.<sup>7</sup> But he cannot go behind the record, and prove, in justification of his disregard of the claim, that the note on which the judgment was founded embraced a book account, part of which was anterior to July 4th 1849.<sup>8</sup>

In an action of trespass for disregarding a debtor's claim for exemption, the debt cannot be defalked against the damages due the debtor.<sup>9</sup>

If the officer give a reason for refusing the exemption claimed, he will be treated as having waived all other objections to the manner of making it;<sup>9</sup> but where the deputy sheriff refused, saying that the plaintiff required him to go on, this was not such an assignment of a reason for his refusal as would prevent the sheriff from setting up the true reason; and declarations of the deputy, made after the sale, as to what had been the reasons for the refusal, would not affect his principal.<sup>10</sup>

The officer's disregard of the claim for exemption will not vitiate the title of the purchaser.<sup>11</sup>

<sup>1</sup> Smith v. Emerson, 7 Wright 456.

<sup>2</sup> Elliott v. Flanigan, 1 Wright 425.

<sup>3</sup> Gilleland v. Rhoads, 1 Casey 187.

<sup>4</sup> Strouse's Ex'r. v. Becker, 2 Wright 190.

<sup>5</sup> Freeman v. Smith, 6 Casey 264.

<sup>6</sup> Emerson v. Smith, S. C., 23 Leg.

Int. 77.

<sup>7</sup> Harleman v. Buck, 6 Casey 267.

<sup>8</sup> Diehl v. Holben, 3 Wright 213.

<sup>9</sup> Wilson v. McElroy, 8 Casey 83.

<sup>10</sup> Kensel v. Kern, D. C. Phila., 4 Phila. Rep. 86.

<sup>11</sup> Hatch v. Bartle, 9 Wright 166.

*Waiver of exemption.*—The privilege of exemption, under the Act of 1849, is one which the debtor may waive.<sup>1</sup> The waiver may be either express or tacit.<sup>2</sup> A stipulation in a bond, "waiving all law or laws that would prevent A., his heirs, executors, or administrators, from levy and sale," &c., is a waiver of the exemption law, and can only be got rid of upon the ground of fraud, accident, mistake, or some other equitable principle.<sup>3</sup> Express waivers of exemption are very common in leases for years, and warrants of attorney to confess judgment. They have the peculiarity that when made at the time the debt is created, they are regarded in law as part of the consideration for the debt, and are irrevocable by the debtor.<sup>4</sup> And an express waiver in writing, even after the levy, has been held to be irrevocable.<sup>5</sup> But a waiver on one judgment does not debar the defendant from claiming exemption as to others,<sup>6</sup> except, as will be seen hereafter, in the case of a waiver on a posterior judgment.

The debtor tacitly waives his claim by neglecting to make his demand for an appraisal,<sup>7</sup> or by not making it in time,<sup>8</sup> or not making it according to the terms prescribed by the statute,<sup>9</sup> or by not making it upon the proper writ.<sup>10</sup> And unless the exemption is expressly reserved in a deed of assignment for the benefit of creditors, it is regarded as waived by the assignor.<sup>11</sup> But a waiver of exemption from distress for rent as to personal property on the premises, contained in a lease, was a waiver in case of distress only, and exemption was allowed on a judgment obtained upon notes given, without waiver, for arrears of rent.<sup>12</sup>

*Abandonment of claim.*—As the debtor may waive the claim, so he may release it when made, and he may do this at any time before the decree of distribution.<sup>13</sup>

*Effect of waiver.*—An express waiver of the Exemption Law is a contract that, so far as regards the judgment-creditor, in whose favor it is made, the debt shall be collectable in the same manner as though the act had never been passed.<sup>14</sup> Where two judgments were entered on the same day, of which one was on a debt contracted before July 4th 1849, and as to the other there was a waiver of exemption, they are payable *pro rata* out of the proceeds.<sup>15</sup>

The effect which a waiver of exemption as to a junior judgment will have upon the rights of the prior lien-creditors, as to whom there is no waiver, has been much discussed, and it seems now to be settled that it will not give such judgment any priority over

<sup>1</sup> Winchester v. Costello, 2 Par. 279; Case v. Dunmore, 11 Harris 93; Lauck's Appeal, 12 Ibid. 426; Bowman v. Smiley, 7 Casey 225.

<sup>2</sup> Line's Appeal, 2 Grant 197.

<sup>3</sup> Smiley v. Bowman, 3 Ibid. 132.

<sup>4</sup> Case v. Dunmore, 11 Harris 93; Bowman v. Smiley, 7 Casey 225; Smiley v. Bowman, 3 Grant 132.

<sup>5</sup> Winchester v. Costello, 2 Pars. 279.

<sup>6</sup> Johnston's Appeal, 1 Casey 116.

<sup>7</sup> Rogers v. Waterman, 1 Casey 183; Dodson's Appeal, Ibid. 232; Becker's

Appeal, 3 Ibid. 52.

<sup>8</sup> Miller's Appeal, 4 Harris 301; Line's Appeal, 2 Grant 197.

<sup>9</sup> Weaver's Appeal, 6 Harris 307; Line's Appeal, 2 Grant 197.

<sup>10</sup> Shelly's Appeal, 12 Casey 373; McAfoose's Appeal, 8 Ibid. 276.

<sup>11</sup> Blackburne's Appeal, 3 Wright 160.

<sup>12</sup> Mitchell v. Coates, 11 Ibid. 202.

<sup>13</sup> Kyle's Appeal, 9 Ibid. 353.

<sup>14</sup> Bowman v. Smiley, 7 Casey 225.

<sup>15</sup> McAfoose's Appeal, 8 Ibid. 276.

those as to which exemption has not been waived; the effect of such waiver is to let all the prior judgments in upon the fund in the order of their priority.<sup>1</sup> And the same rule applies to executions.<sup>2</sup> And the waiver by a tenant in favor of his execution-creditor, will give the latter no preference over the claim of the landlord in whose favor there is no such waiver.<sup>3</sup> So an abandonment of the claim leaves the liens in the same situation with respect to the fund as though the Exemption Law had not been enacted.<sup>4</sup> Therefore a judgment for purchase-money, which would have been preferred as against a prior judgment under which exemption was claimed, loses its preference on the abandonment of the claim for exemption.<sup>5</sup>

On the other hand, a waiver as to the judgment which is first in order of priority, gives subsequent judgment-creditors an equitable right to insist that the first judgment-creditor shall exhaust the amount which is exempted as to them, before coming upon the general fund.<sup>6</sup>

The waiver is a release of the right to an appraisal, and if such demand is made the sheriff need not regard it.<sup>7</sup> And as there can be no valid demand for exemption made in regard to judgment-creditors who have not issued execution,<sup>8</sup> it appears to follow that when exemption has been waived in the only writ issued, it cannot be claimed at all, except in the case of a mortgage, as before explained.

*Privilege not assignable.*—The debtor cannot assign to a third person his right to exemption; whatever he does not claim for himself remains in the fund, to be distributed according to law.<sup>9</sup>

*Fraud on part of defendant forfeits his right to the exemption,* whether it be committed by falsely denying to the sheriff the ownership of the property, in order to hinder and delay him in the collection of the debt, although the falsehood was for the purpose of gaining time for the payment of the execution;<sup>10</sup> or by conveying the legal title of his estate in fraud of his creditors.<sup>11</sup> And it makes no difference that the levy was on partnership property for a separate debt of one partner.<sup>12</sup>

*Of the claim under the Widow's Act.*—There is a species of exemption of the property of defendants from liability on account of their debts, which differs from exemption proper in these respects; that it only applies to estates of decedents, is not confined to proceedings in execution, and is intended not for the benefit of the defendant himself, but for that of his widow or children. Still, as the amount exempted, and the mode of proceeding to obtain the benefit of the exemption, are similar to those under the Act of 1849,

<sup>1</sup> Bowyer's Appeal, 9 Harris 210; Garrett's Appeal, 8 Casey 160; Shelly's Appeal, 12 Ibid. 373; Lauck's Appeal, 8 Wright 395.

<sup>2</sup> Garrett's Appeal, 8 Casey 160.

<sup>3</sup> Collins's Appeal, 11 Ibid. 83.

<sup>4</sup> Kyle's Appeal, 9 Wright 353.

<sup>5</sup> Ibid.

<sup>6</sup> Shelly's Appeal, 12 Casey 373; Pittman's Appeal, 12 Wright 315.

<sup>7</sup> Bowman v. Smiley, 7 Casey 225; Smiley v. Bowman, 3 Grant 132.

<sup>8</sup> Shelly's Appeal, 12 Casey 373.

<sup>9</sup> Bowyer's Appeal, 9 Harris 210.

<sup>10</sup> Strouse v. Becker, 2 Wright 190; Dieffenderfer v. Fisher, 3 Grant 30.

<sup>11</sup> Huey's Appeal, 5 Casey 219; Lar-kin v. McAnally, D. C. Phila., 19 Leg. Int. 60.

<sup>12</sup> Smith v. Emerson, 7 Wright 456.

the subject may properly be considered here as a supplement to the practice under that act.

This exemption is given by the Act of 14th April 1851, § 5,<sup>1</sup> which enacts that, "hereafter the widow or the children of any decedent, dying within this commonwealth, testate or intestate, may retain either real or personal property belonging to said estate to the value of three hundred dollars; and the same shall not be sold, but suffered to remain for the use of the widow and family; and it shall be the duty of the executor or administrator of such decedent to have the said property appraised in the same manner as is provided in the Act" of 9th April 1849: "*Provided*, That this section shall not affect or impair any liens for the purchase-money of such real estate; and the said appraisement, upon being signed and certified by the appraisers, and approved by the Orphans' Court, shall be filed among the records thereof."

The previous Act of 26th April 1850, § 25,<sup>2</sup> differed from the Act of 1851, in being confined to insolvent estates, and in requiring that the widow or children claiming the exemption should have resided with the decedent at the time of his death.

*In what cases the exemption may be claimed.*—It makes no difference whether the husband died testate or intestate, solvent or insolvent.<sup>3</sup> Nor does it make any difference whether the widow elects to take under the will of her deceased husband, or prefers her statutory rights; the act withdraws so much of the estate from the general course of the administration, and specifically appropriates it to the "widow and family."<sup>4</sup> And where the testator gave to his widow so much of his estate "as she is justly entitled to by the laws of this commonwealth, and no more," she was entitled, in addition to her thirds, to the three hundred dollars allowed widows by the Act of 1851.<sup>5</sup>

*Against what creditors or liens.*—The act itself provides that liens of purchase-money of land shall not be impaired or affected by the exemption.<sup>6</sup> But money borrowed by the husband to pay for land, and secured by mortgage upon the land purchased with it, is not purchase-money in this sense.<sup>7</sup> But this is the only restriction,<sup>8</sup> and the existence of the debt before the 4th of July 1849 does not affect the widow's claim under the Act of 1851, though, as we have seen, it would bar the claim for exemption under the Act of 1849.<sup>9</sup> Nor does a waiver by the husband of the benefit of the exemption, under the Act of 1849, as to a certain judgment, give that judgment any priority over the widow's claim under the Act of 1851.<sup>10</sup>

But the Act of 1850 is prospective in its terms (and the same is

<sup>1</sup> Purd. Dig. 281, pl. 58, Pamph. L. 613.

<sup>2</sup> Pamph. L. 581.

<sup>3</sup> *Compher v. Compher*, 1 Casey 31; *Hill v. Hill's Administrators*, 8 Ibid. 511.

<sup>4</sup> *Compher v. Compher*, 1 Casey 31.

<sup>5</sup> *Sineman's Appeal*, 10 Casey 394.

<sup>6</sup> *S. c. supra*.

<sup>7</sup> *Notte's Appeal*, S. Ct., 20 Leg. Int. 228.

<sup>8</sup> *Hildebrand's Appeal*, 3 Wright 133; *Baldy's Appeal*, 4 Ibid. 328.

<sup>9</sup> *Baldy's Appeal*, 4 Wright 328. See *contra*, *Gish & Henzey's Appeal*, 7 Casey 279, per PORTER, J.

<sup>10</sup> *Spencer's Appeal*, 3 Casey 218.

true of the Act of 1851), and therefore the lien of a judgment entered before the passage of the act, will be entitled to priority over the widow's claim as against the real estate of the decedent.<sup>1</sup> But a debt which was not a *lien* against the husband's estate prior to the passage of the act, has no such priority.<sup>2</sup> The widow's claim for exemption will prevail against a mechanic's lien;<sup>3</sup> but not against arrears of ground-rent.<sup>4</sup>

She is entitled to her allowance in preference to a judgment-creditor who loaned decedent money to pay for a house and lot of which he died seised.<sup>5</sup>

*Out of what property.*—The Act of 1851 merely provides that the amount exempted may be retained out of either real or personal property belonging to the estate; and the widow may elect to take the \$300 out of any money or evidence of debt belonging to the estate.<sup>6</sup> And now, the widow or children entitled under the law to retain \$300 out of the decedent's estate may elect to retain the same, or any part thereof, out of any bank notes, money, stocks, judgments, or other indebtedness to decedent.<sup>7</sup> But it cannot be claimed out of the proceeds of real estate coming to the hands of an executor;<sup>8</sup> nor out of the proceeds of lands in another state, brought here for distribution.<sup>9</sup> Nor out of land which has been taken in execution in decedent's lifetime, and regularly sold after his death, and the purchase-money paid, and the sheriff's deed acknowledged and delivered.<sup>10</sup> And where the widow claims and takes personally, without appraisement, as part of her allowance, and then the administrator converts the remainder into money, which he employs in paying for land contracted for by decedent, taking the deed in the name of the heirs, the widow cannot claim the balance of her allowance out of such land.<sup>11</sup> A sale of the land will not be decreed for the purpose of giving the widow her statutory allowance.<sup>12</sup>

If she elects to take personal property in the first instance, and it falls short of \$300, she may have the balance out of the real estate, but the proceedings must be had before the same appraiser.<sup>13</sup>

*By whom the claim may be made.*—The act provides that the claim may be made by the widow or children of decedent. But a wife living in a foreign country, never having formed a portion of decedent's family in this country, cannot claim the exemption.<sup>14</sup>

<sup>1</sup> Neff's Appeal, 9 Harris 247; Becker's Appeal, 3 Casey 52; Gish's Appeal, 7 Ibid. 277; Davis's Estate, C. P. Phila., 1 Phila. Rep. 360; Young's Estate, O. C. Phila., 1 Phila. Rep. 403; Rishell v. Rishell, 12 Wright 243.

<sup>2</sup> Baldy's Appeal, 4 Wright 328; Hill v. Hill's Administrator, 6 Ibid. 198.

<sup>3</sup> Hildebrand's Appeal, 3 Wright 133, overruling Molz's Estate, O. C. Phila., 4 Phila. Rep. 187.

<sup>4</sup> Pepper's Estate, 1 Phila. Rep. 562.

<sup>5</sup> Nottes's Appeal, 9 Wright 361.

<sup>6</sup> Larrison's Appeal, 12 Casey 130.

<sup>7</sup> Act 8th April 1859, § 1, Purd. Dig. 281, pl. 59, Pamph. L. 425. This act was merely declaratory of the existing law: Larrison's Appeal, 12 Casey 130.

<sup>8</sup> Dech's Estate, C. P. Phila., 22 Leg. Int. 229.

<sup>9</sup> Hopper's Estate, 2 Phila. Rep. 367.

<sup>10</sup> Thompson's Appeal, 12 Casey 418.

<sup>11</sup> Baskin's Appeal, 2 Wright 65.

<sup>12</sup> Lyman's Administrator v. Bryan, Ibid. 478.

<sup>13</sup> Bryan's Estate, O. C. Bucks, 4 Phila. Rep. 228.

<sup>14</sup> Spier's Appeal, 2 Casey 233.

Nor can a woman who, without reasonable cause, had deserted her husband more than twelve years before his death, though no actual divorce was had.<sup>1</sup> Nor a widow who, for a valuable consideration, had relinquished, by articles of separation, all claim to her husband's estate.<sup>2</sup> But where a widow, who had been divorced from her first husband on the ground of his desertion, and had married again, brings an action against the administrator of her second husband for refusing to make an appraisal of property to the amount of her claim against the estate, evidence of adulterous intercourse with the second husband, before the marriage with him, is inadmissible to invalidate her right to the exemption.<sup>3</sup> Where the decedent left a widow, and children by a former wife who were of full age and unmarried, the entire sum of \$300 was decreed to be paid to the widow, not divided between her and the children.<sup>4</sup>

*Manner and time of making the claim.*—The only provision in the act in reference to the form of the claim, is that it must be presented to the administrators or executors of the decedent. It need not be made in the mode prescribed by the Act of 1849.<sup>5</sup> A demand made, before administration granted, of one who afterwards was appointed administrator, is not sufficient.<sup>6</sup> Precedents may be found in Smith.<sup>7</sup> In regard to the time of making the claim, it has been held that the act is to receive the same construction as the Act of 1849, and that the claim is waived if made too late, as after the administrator has incurred expenses in proceedings to effect a sale of the property;<sup>8</sup> or after the expenses of a full administration have been incurred;<sup>9</sup> or after the estate has been converted into money;<sup>10</sup> or after the assets have been otherwise properly appropriated.<sup>11</sup> So she cannot withhold her claim until the personal property is exhausted and then demand that real estate be sold.<sup>12</sup> But after having made her claim before the estate has been converted into money in process of administration, she may be paid out of the proceeds; but a sale will not be decreed for the purpose of giving the widow her statutory allowance.<sup>13</sup> But where the interests of other parties are not affected by her tardiness, the estate being all in money in the hands of the executor, a claim made before the auditor is not too late.<sup>14</sup>

She cannot make the claim after the lapse of seven years, and a

<sup>1</sup> Tozer v. Tozer, 2 Am. Law Reg. pl. 52.  
510, per LOWRIE, J.

<sup>2</sup> Dillinger's Appeal, 11 Casey 357.  
See Hutton v. Hutton's Administrator, 3 Barr 104.

<sup>3</sup> Hill's Administrator v. Hill, 6 Wright 198. *Semble aliter*, if the divorce had been on the ground of her adultery with him who afterwards became her second husband: *Ibid.*, per THOMPSON, J.

<sup>4</sup> Nevins's Appeal, 11 Wright 230.

<sup>5</sup> Stineman's Appeal, 10 Casey 394.

<sup>6</sup> Bryan's Estate, O. C. Bucks, 4 Phila. Rep. 223.

<sup>7</sup> Smith's Forms 160, pl. 48; 162,

<sup>8</sup> Davis's Appeal, 10 Casey 256.

<sup>9</sup> Baskin's Appeal, 2 Wright 65.

<sup>10</sup> Neff's Appeal, 9 Harris 243; Bryan's Estate, O. C. Bucks, 4 Phila. Rep. 228; Crause's Estate, C. P. Phila., 22 Leg. Int. 229.

<sup>11</sup> Tibbins's Estate, O. C. Phila., 19 Leg. Int. 229.

<sup>12</sup> Scott's Estate, C. P. Phila., 2 Phila. Rep. 135.

<sup>13</sup> Lyman's Administrator v. Byam, 2 Wright 478.

<sup>14</sup> Kirkpatrick's Estate, O. C. Phila., 19 Leg. Int. 117.

second marriage,<sup>1</sup> but whether her second marriage would alone have been a bar to her claim, was not decided.<sup>2</sup>

By claiming and taking but part of the amount to which she is entitled, she waives her claim for the balance;<sup>3</sup> and by electing to take part out of the personalty, she waives her claim for the balance against the realty.<sup>4</sup>

*Appraisement.*—If the demand for an appraisement is proper and in time, the executor or administrator is bound to comply with it.<sup>5</sup> Prior to the Act of 1859,<sup>6</sup> there was no necessity for an appraisement where the election was to retain money or evidences of debt belonging to the estate,<sup>7</sup> and none is necessary, in such case, under that act.<sup>8</sup> The appraisement should be made promptly, immediately after the administrator has qualified himself to act.<sup>9</sup> It is to be made in all cases by the appraisers of the other personal estate of the decedent.<sup>10</sup> It is no objection that the appraisers first appraised the goods, and then let the widow select her share according to that valuation, instead of first letting her select and then appraising what she took.<sup>11</sup> If the appraisement is too low it may be set aside by the court, provided the objection is taken in time; but after the widow has had possession of the goods for nine months after confirmation of the appraisement, it is too late for a guardian of the minor children to apply to have the decree of confirmation opened and the appraisement set aside on that ground, and if he officiously interferes in this way the costs will be imposed upon him.<sup>12</sup>

The appraisers are to be the same persons who appraise the other personal estate of the decedent.<sup>13</sup> Disinterested and competent men should be selected for appraisers, but the mere fact of the relationship of two out of the three appraisers to the decedent, or the widow, is not enough to avoid their proceedings.<sup>14</sup> They must be sworn, but where the only controversy is in regard to the appraisement of the widow's allowance, a certificate of a justice that they were sworn as to that is sufficient.<sup>15</sup> The sworn appraisers are the officers legally authorized to make the valuation, and the court cannot substitute a valuation by an auditor for that of the appraisers.<sup>16</sup> Forms of return by appraisers are given by Smith.<sup>17</sup>

*Confirmation.*—The Act of 1851 provides that the appraisement upon being signed and certified by the appraisers and approved by the Orphans' Court, shall be filed among the records thereof. In Cumberland county the inventory and appraisement must be recorded by the clerk of the Orphans' Court.<sup>18</sup> Where the widow administra

<sup>1</sup> *Burk v. Gleason*, 10 Wright 297.

<sup>2</sup> *Ibid.* See *Hill's Administrator v. Hill*, 6 Wright 198.

<sup>3</sup> *Baskin's Appeal*, 2 *Ibid.* 65.

<sup>4</sup> *Davis's Appeal*, 10 Casey 256.

<sup>5</sup> *Compher v. Compher*, 1 Casey 31.

<sup>6</sup> Act 8th April 1859, § 1, *Purd. Dig.* 281, pl. 59, *Pamph. L.* 425.

<sup>7</sup> *Larrison's Appeal*, 12 Casey 130.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Vandevort's Appeal*, 7 Wright 462.

<sup>10</sup> Act 8th April 1859, § 1, *ubi supra*.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> Act 8th April 1859, § 1, *Purd. Dig.* 281, pl. 59, *Pamph. L.* 425.

<sup>14</sup> *Vandevort's Appeal*, 7 Wright 462.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> See *Smith's Forms* 161, pl. 49, 50, 51; 163, pl. 53; 164, pl. 54.

<sup>18</sup> Act 15th April 1863, § 1, *Pamph. L.* 459.



trix claimed the allowance, and presented the appraisement to the Orphans' Court for confirmation, but the court declined to adjudicate her right thereto until the settlement of the administration account; and afterwards in her account she claimed a credit for the exemption, which was allowed, such allowance was not error, though the appraisement was not confirmed when made, for it was competent for the court to postpone their decision upon it until the filing of the account, and by their final decree thereon to confirm the appraisement.<sup>1</sup>

After confirmation of the appraisement the property mentioned in the inventory is vested absolutely in the widow.<sup>2</sup> And if she sell to a third person she may recover in an action for the price, though the suit was brought in her name as administratrix.<sup>3</sup> When she elects to take the whole, or a part, of her allowance out of real estate, and the appraisers return that the land cannot be divided without injury, such part, after confirmation of the appraisement, becomes a lien on the land, and she may recover the amount from the heirs who accepted the land in partition, or their vendees; and the Orphans' Court has power to enforce payment of the sum so charged, by a decree that it be made by sale out of the lands bound by it, in default of payment by the purchasers, of the several amounts decreed against them in proportion to the valuation of their respective lots made by the inquest.<sup>4</sup>

Where the claim is out of real estate, and the real estate appraised consists of a single messuage or tenement, lot of ground, or other real estate, which cannot be divided without prejudice or spoiling the whole, if the same is appraised at less than six hundred dollars, the Orphans' Court may confirm the appraisement and set apart the real estate for the use of the widow or children, and it will be vested in her or them absolutely on payment by her or them, within one year from such confirmation, of the excess above three hundred dollars, to the parties entitled thereto.<sup>5</sup> And if the widow or children refuse to take such real estate at the appraisement, the court, on the application of any person interested, may order it to be sold, and three hundred dollars of the purchase-money to be paid to the widow or children, and the balance to the parties legally entitled thereto.<sup>6</sup>

*Appeal* from the decree of confirmation, lies as in other cases of final decree.

*Refusal to appraise.*—If the executor or administrator refuse to grant the widow's request for an appraisement, he becomes liable to an action at law for damages.<sup>7</sup> The form of the remedy is a special action on the case, or *assumpsit*; if the goods have been converted into money she has not such a general or special property in any particular goods as will sustain an action of trespass.<sup>8</sup> Where the widow appropriates to herself, without appraisement, personal pro-

<sup>1</sup> Baldy's Appeal, 4 Wright 328.

<sup>2</sup> Runyan's Appeal, 3 Casey 121.

<sup>3</sup> Filson v. Dunbar, 2 Ibid. 475.

<sup>4</sup> Detweiler's Appeal, 8 Wright 243.

<sup>5</sup> Act 27th November 1865, § 1, 2, Purd. Dig. 1449, Pamph. L., 1866, p.

1277.

<sup>6</sup> Ibid.

<sup>7</sup> Compher v. Compher, 1 Casey 31.

<sup>8</sup> Bryan's Estate, O. C. Bucks, 4 Phila. Rep. 228.

<sup>9</sup> Neely v. McCormick, 1 Casev 253

perty of the decedent, she should be charged with its value, in a suit by her against the administrator for refusing an appraisalment.<sup>1</sup>

In this action the heirs of intestate, and the sureties upon the administration-bond, are competent witnesses for the defendant administrator.<sup>2</sup> The action is for the administrator's own tort, and judgment against him is *de bonis propriis*.<sup>3</sup>

*Waiver*.—The right to the allowance is a personal privilege, which may be waived.<sup>4</sup> We have already seen that her neglect to demand an appraisalment at the proper time amounts to a waiver. It has also been decided that an election to retain property less in value than \$300, is a waiver of her right to the balance.<sup>5</sup>

4. *Of the time within which execution may be had, and herein of the stay of execution—and of the power of the court to control, stay, and set aside executions.*

*Time after which execution may issue*.—Execution may in general issue immediately after the entry of judgment; but care must be taken not to sue out the writ till judgment is actually entered.<sup>6</sup> Where there is a plea of *nul tiel record*, and a verdict on an issue of fact, and judgment is entered on the verdict, execution cannot be sued out until the issue of law is disposed of; and the Supreme Court refused to intend that this was done, and held that the execution issued improvidently.<sup>7</sup> So where a joint judgment against two has been opened as to one of the defendants, it is error to permit execution to issue against the other defendant until the question as to the liability of the first has been disposed of.<sup>8</sup> But when a conditional verdict in ejectment fixed a period for the payment of money by the defendant, and the judgment was not entered till such period had arrived, execution issued immediately after the judgment became absolute was not premature.<sup>9</sup> An execution issued from the Common Pleas on a transcript of a justice's judgment, without a certificate of an execution, issued and returned before the justice, being first shown to the prothonotary, will render him liable to defendant.<sup>10</sup> And when judgment was entered by default, the court set aside an execution issued before a declaration was filed.<sup>11</sup>

An execution for costs merely, if issued before taxation of costs, is irregular; the record must show the amount due for costs on taxation, or it will not sustain an execution for them.<sup>12</sup> By the rules of the Common Pleas of Philadelphia, a sworn bill of costs must be filed before execution can issue.<sup>13</sup>

A note payable one day after date is not due for the purpose of commencing suit or entering judgment until after the expiration of the day of payment.<sup>14</sup> But on a judgment confessed on a judgment-

<sup>1</sup> Lyman's Administrator v. Byam, 2 Wright 478.

<sup>2</sup> Hill v. Hill's Administrators, 8 Casey 511.

<sup>3</sup> Ibid.

<sup>4</sup> Davis's Appeal, 10 Casey 256.

<sup>5</sup> Ibid.; Baskin's Appeal, 2 Wright 65; Bryan's Estate, O. C. Bucks, 4 Phila. Rep. 228.

<sup>6</sup> 7 T. R. 21, n.; and see 2 Show. 494.

<sup>7</sup> Beale v. Buchanan, 9 Barr 123.

<sup>8</sup> Struthers v. Lloyd, 2 Harris 216.

<sup>9</sup> Allen v. Woods, 12 Ibid. 76.

<sup>10</sup> Frankem v. Trimble, 5 Barr 520.

<sup>11</sup> Jeisley v. Haiter, 4 Yeates 337.

<sup>12</sup> Harger v. Commissioners, 2 Jones 251.

<sup>13</sup> Walker's Rules 48.

<sup>14</sup> Taylor v. Jacoby, 2 Barr 495.

note, having a warrant of attorney incorporated in the instrument, execution may issue on the day after the note falls due, the maker not being entitled to the days of grace on it as on a negotiable note.<sup>1</sup> And where on the day a note fell due, judgment was entered under a power of attorney to confess judgment without stay of execution, and execution issued, and the defendant subsequently admitted that the execution had been issued with his consent, and under an understanding that there was to be no stay of execution, the court properly refused to set aside the execution for irregularity, at the instance of the defendant.<sup>2</sup> So where judgment was confessed on a bond conditioned for the payment of certain notes, execution issued before the notes fell due was not void.<sup>3</sup>

When execution was issued before the judgment was ripe, subsequent judgment-creditors cannot take advantage of it.<sup>4</sup> Execution issued before the stay of execution has expired is irregular, and will be set aside by the court: but it is valid until set aside, and cannot be attacked collaterally by another execution-creditor, except by fraud.<sup>5</sup>

The stay required in certain cases, in order to allow a writ of error to issue, will be considered presently.<sup>6</sup>

*Time within which execution must issue.*—At common law execution must have been sued out within a year and a day after the judgment was entered, otherwise the court presumes *prima facie* that the judgment was satisfied. But after a delay of a year and a day, the plaintiff could have a *scire facias* under the stat. West. 2, c. 45 (13 Ed. I.), to compel the defendant to show cause why the judgment should not be revived and execution had against him, to which the defendant might plead such matter as he had to allege in that behalf; or the plaintiff might bring an action of debt on the judgment, which was the only common law method of revival; and on obtaining judgment in either of these proceedings the plaintiff might issue execution thereon in the same manner as on the original judgment.<sup>7</sup> But the plaintiff could prevent the presumption from arising, that the judgment had been satisfied, by issuing execution within the year and the day, and then, though such execution was not returned, an *alias* execution might be sued out at any time afterwards, without a *scire facias* to revive the judgment, provided continuances by *vice comes non misit breve* were entered.<sup>8</sup> And in such case it was sufficient to enter the formal continuances after the second writ was actually sued out.<sup>9</sup> And it was not necessary that the last writ should be of the same species as the former; for instance, a *ca. sa.* might issue after the year, upon a *fi. fa.* regularly sued out before that time.<sup>10</sup>

The rule as to a year and a day was the law in this state down

<sup>1</sup> *Overton v. Tyler*, 3 Barr 346.

<sup>2</sup> *Roemer v. Denig*, 6 Harris 482.

<sup>3</sup> *Stewart v. Stocker*, 13 S. & R. 199; s. c., 1 Watts 135. See Lowber's Appeal, 8 W. & S. 389.

<sup>4</sup> *Kamony's Appeal*, 1 Am. L. J. 78.

<sup>5</sup> *Stewart v. Stocker*, 13 S. & R. 203.

<sup>6</sup> See *post*.

<sup>7</sup> See 3 Bl. Com. 421. See *post*, Vol. II., "Scire Facias quare ex. non."

<sup>8</sup> *Lewis v. Smith*, 2 S. & R. 142; *Young v. Taylor*, 2 Binn. 218; *Pennock v. Hart*, 8 S. & R. 378; and see 1 Arch. Pr. 255.

<sup>9</sup> *Lewis v. Smith*, 2 S. & R. 142.

<sup>10</sup> Barnes 313; 1 Saund. 219 c.

to the Act of 16th June 1836, which re-enacted it, with the *proviso* that if there should be a stay of execution, the period should be computed from the expiration of the stay, and that the time should not run during the pendency of a writ of error.<sup>1</sup> But by the Act of 16th April 1845, the period within which execution can be issued, without a previous revival of the judgment, is extended to five years.<sup>2</sup> And this applies as well to executions on revived as on original judgments.<sup>3</sup> The Act of 1845 has been construed in practice to make no alteration in the law as to keeping the judgment alive by issuing an execution within the period allowed for that purpose, and entering formal continuances. And in practice an execution is often issued immediately after entry of judgment, with directions to the sheriff to return it *nulla bona*; the effect of this is that an *alias* may afterwards be issued after the expiration of five years without the delay of a *scire facias*. And the period of five years now applies to judgments before a justice of the peace.<sup>4</sup>

An execution, issued after the lapse of the prescribed period, without a previous *scire facias*, is not, however, void, but only voidable.<sup>5</sup> The practice in regard to *scire facias* will be explained in the second volume.<sup>6</sup>

*Death of plaintiff.*—If the plaintiff die after a *fi. fa.* sued out, it may be executed notwithstanding, and the plaintiff's executor or administrator shall have the money.<sup>7</sup> When the plaintiff dies in vacation the execution may be sued out by the executor or administrator, tested of the last term, and the court will not inquire when it was sued out.

*Death of defendant.*—Formerly, if the defendant died within the year and day after judgment, a *fi. fa.*, tested before his death, could have been sued out against his goods in the hands of his executor or administrator,<sup>8</sup> or even if he died before judgment but after the day in banc, judgment might have been signed as of the term in which he died (or if he died in vacation, then as of the preceding term), and a *fi. fa.* tested the first day of such term might have been sued out and executed against his goods in the hands of his executor, &c.<sup>9</sup> And where a *fi. fa.* was tested before the death of one of the defendants, an *alias* and a *venditioni exponas*, issued against him without noticing his representatives, were regular.<sup>10</sup> But now, by the 33d section of the Act of 24th February 1836,<sup>11</sup> it is directed that no execution for the levy or sale of any real or personal estate of any decedent shall be issued upon any judgment

<sup>1</sup> Act 16th June 1836, §§ 1, 2, Purd. Dig. 431, pl. 1, Pamph. L. 761.

<sup>2</sup> Act 16th April 1845, § 4, Purd. Dig. 431, pl. 2, Pamph. L. 538.

<sup>3</sup> Daily v. Straus, 2 Barr 401; Heebner v. Chave, 5 Ibid. 115.

<sup>4</sup> Act 5th May 1854, Purd. Dig. 601, pl. 78, Pamph. L. 581; Bannan v. Rathbone, 3 Grant 259.

<sup>5</sup> Vastine v. Fury, 2 S. & R. 426; Bailey v. Wagoner, 17 S. & R. 327; Speer v. Sample, 4 Watts 373. But such execution is irregular: Bannan v.

Rathbone, S. C., 15 Leg. Int. 284. Though such irregularity cannot be taken advantage of collaterally: Commonwealth v. Lelar, 1 Harris 22.

<sup>6</sup> See post, Vol. II., "Scire Facias quare executionem non."

<sup>7</sup> 2 Ld. Raym. 1072; s. c. Salk. 322, pl. 10.

<sup>8</sup> 1 B. & P. 571; 2 Ld. Raym. 849.

<sup>9</sup> 7 T. R. 20.

<sup>10</sup> Springer v. Brown, 9 Barr 305.

<sup>11</sup> Purd. Dig. 288, pl. 99, Pamph. L. 79.

obtained against him in his lifetime, unless his personal representatives have been first warned by a writ of *scire facias*, to show cause against the execution thereof, notwithstanding the *teste* of such execution may bear date antecedently to his death. It follows that an execution *issued* in the lifetime of the defendant may be *executed* notwithstanding his death.<sup>1</sup> The practice in the substitution of executors where the defendant has died since the judgment will be found in the second volume.<sup>2</sup>

*Stay on account of a writ of error or appeal.*—It has been seen that the plaintiff must wait four days after verdict, in order to allow the defendant to move for a new trial, or in arrest of judgment, before the judgment can be entered. In certain cases it is provided that, in order to allow every party sufficient opportunity to take out a writ of error, no execution shall issue upon any judgment on any special verdict, demurrer, or case stated, unless by leave of the court in special cases for the security of the demand, within three weeks from the day on which such judgment shall be pronounced.<sup>3</sup> Upon judgments upon general verdicts the writ of error should be sued out and bail given within the four days allowed between the verdict and the entry of judgment, else an execution may be issued and levied, and the defendant thus subjected to costs. For, by the Act of 16th June 1836,<sup>4</sup> if a writ of error be issued, served, and bail entered within three weeks from the entry of judgment, the writ of execution, although service or execution thereof is actually begun, will be stayed and superseded upon payment of costs; and if the execution has been fully executed, the defendant may have a writ of restitution of the proceeds, as the case may require. But a writ of error taken out and served even after these periods, if bail be given, will operate as a stay of execution, if the execution is not actually executed.<sup>5</sup> A *fi. fa.* returned *nulla bona*, and an *alias fi. fa.* returned stayed, does not prevent the *supersedeas* of a writ of error.<sup>6</sup> But in case of personal property a levy on the goods, and in case of real property levy under a *fi. fa.*, followed by condemnation and the issue of a *venditioni exponas*, but without a sale, will prevent the writ of error from being a *supersedeas*.<sup>7</sup> A second writ of error, after a *non pros.* of the first, will not be a *supersedeas*.<sup>8</sup> It is otherwise if the first writ abated by the act of God.<sup>9</sup> So, if there be but a single surety on the recognisance of bail in error, it is not a *supersedeas*, and the court below may issue execution, notwithstanding the removal of the record.<sup>10</sup>

<sup>1</sup> This was the old practice: 2 Ld. Raym. 1072; s. c. Salk. 322, pl. 10.

<sup>2</sup> See Vol. II., "Scire Facias on Change of Parties."

<sup>3</sup> Act 11th March 1809, 5 Sm. Laws 17, Purd. Dig. 410, pl. 8.

<sup>4</sup> Sect. 8, Purd. Dig. 411, pl. 15, Pamph. L. 762.

<sup>5</sup> Salk. 321, pl. 8; Willes 271, s. c.; Barnes 205; Bryan v. Comly, 2 Miles 271; Adams v. Hindman, Ibid. 464; Patterson v. Juvenal, D. C. Phil., ante

688, note 5.

<sup>6</sup> Roberts v. Springer, D. C. Phila., cited in Bozarth v. Marshall, D. C. Phil., 1 Phila. R. 172.

<sup>7</sup> As to personalty, 9 Johns. 66, 17; Ibid. 34; as to realty, Bozarth v. Marshall, D. C. Phil., 1 Phila. R. 172.

<sup>8</sup> Power v. Frick, 2 Grant 306.

<sup>9</sup> Sherer v. Grier, 3 Whart. 14.

<sup>10</sup> Henry v. Boyle, 1 Miles 386; Rheem v. Naugatuck Wheel Co., 9 Casey 356.

Where writs of error from the Supreme Court of Pennsylvania to the Supreme Court of the United States were not delivered in time, under the practice of the latter court, the defendant is not entitled to stay of execution.<sup>1</sup>

Where an appeal from the judgment of a justice is taken within the time allowed for that purpose, though after execution issued, it is the duty of the justice to revoke the execution. The justice is the proper person to determine the regularity of the appeal: the constable cannot refuse to recognise it, and proceed to a sale, on the ground that the justice has committed an error; if he does so proceed he becomes a trespasser, and the purchaser takes no title.<sup>2</sup>

Execution cannot issue on an award under the Act of 1836, until the expiration of the twenty days allowed for an appeal; and this whether the reference was after an appeal from the judgment of a justice, or in a suit originally brought in a court of record.<sup>3</sup> And the same rule applies to awards under the 11th section of the Act of 20th March 1810,<sup>4</sup> and under that act the prothonotary has no power to issue executions until the expiration of the twenty days, whether the defendant was a freeholder or not. If he omit to appeal, or give the prescribed security within that time, judgment is final, and execution may then be issued, unless special bail had previously been entered, in which case the defendant has a stay for thirty days, as will be seen. But in the cases mentioned in the Acts of 1806 and 1836,<sup>5</sup> executions may issue immediately after judgment,<sup>6</sup> unless they fall within the provisions for a *cesset*. To prevent this it is the practice, when confessing judgments, to stipulate that they shall be considered as being entered upon awards of arbitrators; by this means the defendants are entitled to a stay of twenty days, without any security.

*Stay of execution by agreement.*—Agreements, stipulating for stay of execution, independently of that allowed by law, are frequently made, and courts will see that the proceedings are conducted according to good faith and the understanding of the parties;<sup>7</sup> and, if an agreement for a stay of execution be made, it seems to be now settled that the court will receive evidence of it, although not entered on the record.<sup>8</sup> So, if a plaintiff is bound in equity to make a title to defendant for a portion of the premises, execution will be stayed upon the judgment in ejectment until such title is secured.<sup>9</sup> If, after judgment, an agreement is made between parties that execution shall not be taken out till the next term, and it is sued out before, the court will set aside the proceedings.<sup>10</sup> So, where judgment was entered upon a bond payable at a time certain, execution cannot issue until that time is expired, though no provision for a stay of execution, until that time, has been inserted in the

<sup>1</sup> Penna. R. R. Co. v. Commonwealth,  
3 Wright 403.

<sup>2</sup> O'Donnell v. Mullin, 3 Casey 199.

<sup>3</sup> Woods v. Connor, 6 Barr 430.

<sup>4</sup> 5 Sm. Laws 167.

<sup>5</sup> *Vide post*, "Freeholders," and "Bail  
for Stay of Execution."

<sup>6</sup> Perlasca v. Spargella, 3 Binn. 420.

<sup>7</sup> 2 T. R. 163.

<sup>8</sup> Lessee of Dunlop v. Speer, 3 Binn.  
172.

<sup>9</sup> Lessee of Mathers v. Akewright, 2  
Binn. 93.

<sup>10</sup> 1 Mod. 20.

warrant.<sup>1</sup> On the other hand, the court will not interpose, unless it appears that the execution issued contrary to good faith; upon this principle they refused to set aside an execution, issued before the expiration of the stay, agreed to by plaintiff, on condition that there were then no other judgments but one against defendant, when in fact there were others, as appeared in evidence upon the hearing.<sup>2</sup> So, where judgment was entered, with an agreement that it should be released on the defendant's performing a certain act, without expressly providing for any stay of execution, a *fi. fa.*, issued after allowing a reasonable time, is regular, the defendant having neglected to fulfil the agreement, and no injury could arise from supporting such a proceeding, because the court would always interfere in a summary way to prevent injustice, and enforce the terms on which the judgment was entered. If, however, it had issued immediately after judgment, no doubt the court would have set it aside.<sup>3</sup> So an agreement between the parties to a judgment-note, made at the time of its execution, that execution thereon shall not issue until after the entry of a certain other judgment against defendant and the issue of execution thereon, is valid, and may be enforced by the plaintiff in the preferred judgment, though not a party to the agreement: and if execution issues in violation of the agreement, the plaintiff will be postponed, on the distribution of the proceeds of the sale of personalty, to the plaintiff in the preferred judgment, though the execution of the latter came last into the sheriff's hands.<sup>4</sup> Where such agreement was founded on a representation of the defendant that there was but one other judgment against him, whereas in fact there were three, the court refused to set aside an execution issued prior to the time agreed upon.<sup>5</sup> An omission by the prothonotary to enter on the record a stay of execution, provided for in the warrant of attorney, is not such neglect as to work a forfeiture of his official bond, or make him liable for the amount.<sup>6</sup>

If an execution be issued before the expiration of the stay allowed by law, or fixed by agreement of the parties, the practice is to set it aside on a summary application to the court.<sup>7</sup> But until set aside, or reversed on error, such writ, though irregular, is not void, and cannot be questioned in a collateral proceeding except for fraud.<sup>8</sup> Though the defendant has his remedy if the plaintiff issue execution contrary to agreement, yet the officer executing the writ will be justified by it, and it is no part of his duty to adjust the equities of the parties under the agreement.<sup>9</sup>

Agreements for stay of execution made after the writ has issued and a levy made under it, will expose the plaintiff to the risk of having his execution postponed.<sup>10</sup>

When goods liable for the payment of rent have been seized in

<sup>1</sup> Shoemaker v. Shirtliffe, 1 Dallas 133.

<sup>2</sup> J. Browne 130.

<sup>3</sup> Miller v. Milford, 2 S. & R. 36.

<sup>4</sup> Ayers's Appeal, 4 Casey 179.

<sup>5</sup> Holmes v. Delabourdine, 1 Browne 130.

<sup>6</sup> Commonwealth v. Conrad, 1 Rawle 249.

<sup>7</sup> Banning v. Taylor, 12 Harris 289.

<sup>8</sup> Stewart v. Stocker, 13 S. & R. 203.

<sup>9</sup> Swires v. Brotherline, 5 Wright 135.

<sup>10</sup> See *post*, Sect. 11., "Interference of the Plaintiff," &c.

execution, the plaintiff cannot stay proceedings without obtaining the written consent of the landlord.<sup>1</sup>

*Stay of execution by statute.*—Various Acts of Assembly have at different times been passed—some temporary, others permanent—to secure to defendants a stay of execution. But it seems that a general stay law does not apply to judgments held by the commonwealth.<sup>2</sup> And all laws authorizing a stay of execution upon judgments not exceeding \$100, obtained against any person or persons or chartered company engaged in mining coal for the wages of any miner, mechanic, laborer, or clerk, employed by defendant in and about the business of mining coal, are repealed so far as relates to the counties of Schuylkill, Northumberland, Somerset, Carbon, Washington, and Dauphin.<sup>3</sup>

*a. Freeholders.*—By the third section of the Act of 16th June 1836,<sup>4</sup> it is provided, that in all actions instituted by writ for the recovery of money due by contract, or of damages arising from breach of contract (except actions of debt and *scire facias* upon judgments, and actions of *scire facias* upon mortgages), if the defendant is possessed of an estate in fee simple within the county, worth in the opinion of the court the amount of the judgment, or the sum for which the plaintiff is entitled to have execution, clear of all encumbrances, he shall be entitled to a stay of execution upon such judgment, to be computed from the first day of the term to which the action was commenced, as follows: if the amount or sum aforesaid shall not exceed \$200, six months; if such amount or sum exceeds \$200, but is less than \$500, nine months; if such amount or sum exceeds \$500, twelve months. In amicable actions, the defendant in like cases shall be entitled to the same stay as above, to be computed from the day of the agreement, unless otherwise provided therein by the parties.<sup>5</sup>

*The form* of the suggestion and plea of freehold may be found in Smith's Forms.<sup>6</sup> The defendant must show a freehold not merely worth the amount of the judgment over and above the encumbrances upon it, but clear of all encumbrances.<sup>7</sup> A ground-rent is not an

<sup>1</sup> Act 16th June 1836, § 85, Purd. Dig. 439, pl. 49, Pamph. L. 777.

<sup>2</sup> Commonwealth v. Smith, C. P. Dauphin, 4 Phila. Rep. 421.

<sup>3</sup> Act 30th March 1859, § 5, Purd. Dig. 1007, pl. 11, Pamph. L. 319.

<sup>4</sup> Purd. Dig. 431, pl. 4, Pamph. L. 762.

<sup>5</sup> Act 16th June 1836, § 5, Purd. Dig. 431, pl. 6, Pamph. L. 762.

<sup>6</sup> Sm. Forms 361, pl. 1.

<sup>7</sup> Girard v. Heyl, 6 Binn. 253. In a case arising upon the arrest of a freeholder upon mesne process, where the defendant claimed his privilege as a freeholder under the Act 20th March 1725, it was held that he need not show title, as in ejectment, possession under color of title being, in general, all that has been required: Bidchimer

v. Sterne, D. C. Phila., ante 250, n. (3): and, perhaps, this would be sufficient to obtain stay of execution under the Act of 1836.

The point in the text was held in the following case arising under the Act of 1836, Hansell v. Garwood, D. C. Phila., Monday, March 6th 1848. Why plea of freehold should not be stricken off. *Per curiam*. It was settled in the Supreme Court, in Girard v. Heyl, 6 Binn. 253, that under the 7th section of the Act of 21st March 1806, to entitle a defendant to stay of execution, he must show a freehold not merely worth the amount of the judgment above, or more than the encumbrances upon it, but clear of all encumbrances. The words of this section are identically the same with those of the 3d section



encumbrance within the Act of 1806,<sup>1</sup> so as to defeat the right of the owner of the land out of which the rent issues, to a stay of execution, though such rent is to be considered in estimating the value of the freehold; but the arrears of such rent constitute an encumbrance.<sup>2</sup> On the plea of freehold being entered, the plaintiff may move to dismiss it for insufficiency: in determining the sufficiency of the freehold, the defendant need only show the existence of the freehold affirmatively; it then rests with the plaintiff, if he objects, to show its insufficiency, by records and certificates of search as to encumbrances, &c.<sup>3</sup> The plea of freehold will be stricken off, when the estate is not worth in the opinion of the court the amount of the judgment.<sup>4</sup>

By the words of the act, the stay is allowed only in actions upon contracts; and actions of *scire facias* upon mortgages and of *scire facias* or debt upon judgments are expressly excepted.<sup>5</sup> And no stay can be claimed in an action of debt upon a foreign judgment.<sup>6</sup>

The stay is allowable in a judgment obtained under the Affidavit of Defence Law,<sup>7</sup> and in an action brought into the Common Pleas by appeal from a justice,<sup>8</sup> and in an action of *scire facias* upon a municipal claim;<sup>9</sup> but no defendant shall be entitled to stay of execution upon a judgment obtained against him as bail for stay of execution upon any former judgment;<sup>10</sup> and a garnishee in attachment-execution is not entitled to stay.<sup>11</sup>

Under the Act of 1806, which is supplied by the Act of 1836, it was ruled that the benefit of this stay extends to the case of a judgment entered on an award under the Act of 1810;<sup>12</sup> and to a judgment confessed as upon an award under that act.<sup>13</sup> And a plaintiff in replevin against whom judgment is given, is entitled to the stay.<sup>14</sup>

of the Act of 16th June 1836, the act now in force, though there is a slight transposition, so far at least as regards the point involved in this application. The legislature, by changing the law from requiring in the defendant "a freehold estate" to "an estate in fee simple," leaving words which had received a judicial construction to remain precisely the same, have shown no disposition to extend this privilege of the defendant. Rule absolute.

<sup>1</sup> Act 21st March 1806, § 7, 4 Sm. Laws 329, Pamph. L. 563. This section is substantially the same as sections 3 and 4 of the Act of 1836, above referred to, and is supplied by the latter act.

<sup>2</sup> F. & M. Bank v. Schreiner, 1 Miles 291.

<sup>3</sup> Marseilles v. Garrigues, 2 Ibid. 347.

<sup>4</sup> Harrison v. Hyneman, D. C. Phila., 8 Leg. Int. 106; 1 Phila. Rep. 204, s. c.

<sup>5</sup> Under the Act of 1806 the defendant in *scire facias* upon a mortgage

was not allowed a stay of execution: Anon., D. C. Phila., Dec. 29th 1821, MS. Whart. Dig.

<sup>6</sup> Sloat v. Prentice, 2 Am. L. Reg. 446, per Lowrie, J.

<sup>7</sup> F. & M. Bank v. Schreiner, 1 Miles 291. This was a case under the Act of 1806.

<sup>8</sup> Woods v. Connor, 6 Barr 430.

<sup>9</sup> Northern Liberties v. Pennock, C. P. Phil., Feb. 3d 1849, MS.

<sup>10</sup> Act 25th April 1850, § 28, Purd. Dig. 431, pl. 9, Pamph. L. 574. This act was passed to meet a decision to the contrary in Wolfe v. Nesbit, 4 W. & S. 312. In Gorgas v. Zeop, 2 Miles 101, stay was refused in a similar case.

<sup>11</sup> Woolston v. Adler, 9 Leg. Int. 2; 1 Phila. Rep. 284, s. c.

<sup>12</sup> Perlasca v. Spargella, 3 Binn. 427. See Act 20th March 1810, § 11, 5 Sm. Laws 135.

<sup>13</sup> Roe v. McCrea, 1 Ash. 16.

<sup>14</sup> Ballantine v. O'Neill, C. P., 1816, MS.; Roe v. McCrea, 1 Ash. 16.

A township is not entitled under the Act of 1836 to a stay of execution, on the plea of freehold.<sup>1</sup>

*Period of stay.*—The stay in appeals from magistrates runs from the first day of the term to which the appeal is entered, because the case begins *de novo* from that day.<sup>2</sup> In other cases the stay is to be computed from the first day of the term to which the action was commenced.<sup>3</sup> This means from the return day of the first original process which was effective in bringing the defendant into court.<sup>4</sup>

*Practice.*—In the District Court of Philadelphia when the plaintiff desires to contest the character of defendant's security, he takes a rule to strike off the defendant's plea of freehold, or dismiss it for insufficiency: the defendant must then show the existence of the freehold, and if the plaintiff objects, he must show its insufficiency by records and certificates of search as to encumbrances, &c.<sup>5</sup> If the estate is not worth in the opinion of the court the amount of the judgment, the plea will be stricken off, and the plaintiff goes on with his execution.<sup>6</sup>

If a plea of freehold be entered the plaintiff may issue execution, but at his peril; and if on defendant's motion to set aside the execution, the freehold be found sufficient, the motion will be granted, and the plaintiff will be compelled to pay the costs of the execution; but if the freehold be found insufficient, the execution will be good.<sup>7</sup>

*b. Bail for stay of execution.*—By the 4th section of the Act of 16th June 1836,<sup>8</sup> the defendant in a judgment obtained in any action instituted by writ for the recovery of money due by contract, or of damages arising from breach of contract, except actions of debt and *scire facias* upon judgments, and actions of *scire facias* upon mortgages, may, upon entering security in the nature of special bail, have a stay of execution thereon during thirty days from the rendition of such judgment; and if during that period he shall give security, to be approved of by the court, or by a judge thereof, for the sum recovered, together with interest and costs, he shall be entitled to the stay of execution hereinbefore provided in the case of a person owning real estate. The period of stay, and the class of actions in which it is allowable, are the same where security is given as where freehold is pleaded, and have been already explained.<sup>9</sup> By the 5th section of the act, defendants in amicable actions are entitled to like stay of execution upon giving security as above, such stay to be computed from the date of the agreement, unless it be otherwise provided therein by the parties.<sup>10</sup>

A defendant in a judgment entered on a warrant of attorney is

<sup>1</sup> Morgan v. Moyamensing, 2 Miles 397.

<sup>2</sup> Woods v. Conner, 6 Barr 433.

<sup>3</sup> Act 1836, § 3, *supra*.

<sup>4</sup> Morris v. Cameron, D. C. Phila., *post*, 838, n. 16.

<sup>5</sup> Marseilles v. Garrigues, 2 Miles 347.

<sup>6</sup> Harrison v. Hyneman, D. C. Phila.,

1 Phila. Rep. 204.

<sup>7</sup> Marseilles v. Garrigues, 2 Miles 347.

<sup>8</sup> Purd. Dig. 431, pl. 5, Pamph. L. 762.

<sup>9</sup> *Ante*, 833.

<sup>10</sup> Purd. Dig. 431, pl. 6, Pamph. L. 762.

not entitled to a stay of execution on entering bail.<sup>1</sup> Nor is a garnishee in an attachment-execution.<sup>2</sup>

A *terre-tenant* of land subject to ground-rent, although not originally summoned as a party to the action, may come in after judgment obtained for arrears of ground-rent and enter security for a stay of the execution: the practice in such case in the District Court of Philadelphia, is to require the *terre-tenant* to file an affidavit of record in the cause, of the fact of his ownership of the land subject to the ground-rent, before approving the surety offered.<sup>3</sup>

*The security for thirty days.*—After the entry of judgment, the defendant, if he wishes to obtain the stay of execution allowed by the Act of 1836, must enter security in the nature of special bail.<sup>4</sup> If this is done he thereby obtains a stay of execution for thirty days from the entry of judgment, which delay it is considered will enable him to find and perfect security for the full period allowed by the act. It has been held that where sufficient special bail was entered at the commencement of the action, it is not necessary for the defendant to enter new bail in order to entitle him to the stay of thirty days.<sup>5</sup> But this point is of little importance, as special bail in the commencement of actions is now almost obsolete.

The defendant in an amicable action is entitled to enter security for stay for thirty days;<sup>6</sup> but a female defendant is not; but she may give the absolute security, and if execution be issued within the thirty days, and afterwards, but before the expiration of the thirty days, she gives the absolute security, the court will set aside the execution.<sup>7</sup>

Where the defendant entered special bail for the thirty days' stay, and during the thirty days he was surrendered by his bail, and gave bond to take the benefit of the insolvent laws, it was held that the plaintiff might thereupon issue execution.<sup>8</sup>

It is important that security for the thirty days' stay should be entered immediately upon the rendition of the judgment; for the defendant has no legal right to have an execution set aside, which was issued before the entry of bail for thirty days.<sup>9</sup> But by a rule of the District Court, when the execution is issued more than seven days after the rendition of the judgment, and the defendant enters security, the execution will be set aside upon payment by the defendant of the costs of execution, provided the money has not been made.<sup>10</sup> But where the bail for thirty days was entered after the execution issued, and there was no security for the stay afterwards entered, the court will not set aside the execution.<sup>11</sup>

*Bail for the full period.*—The Act of 1836<sup>12</sup> provides that to

<sup>1</sup> *Slone v. King*, 11 Casey 270.

<sup>2</sup> *Woolston v. Adler*, D. C. Phila., 1 Phila. Rep. 284.

<sup>3</sup> *Jackson v. Juvenal et al.*, D. C. Phila., 1860, MS.

<sup>4</sup> See "Commencement of Actions," ante, 309-12.

<sup>5</sup> *Perlasca v. Spargella*, 3 Binn. 427. This was under the Act of 1806, which was almost identical with the Act of 1836, and is supplied by the latter Act.

<sup>6</sup> *Moss v. Biddle*, 2 Miles 175.

<sup>7</sup> *Fleetwood v. Waters*, Ibid. 111.

<sup>8</sup> *Shove v. Edgell*, Ibid. 174.

<sup>9</sup> *Picard v. Prescott*, D. C. Phila., 1 P. L. J. 1.

<sup>10</sup> Rule LXXVIII., Walker's Rules 28.

<sup>11</sup> *Picard v. Prescott*, D. C. Phila., 1 P. L. J. 1.

<sup>12</sup> Sect. 4, Purd. Dig. 431, pl. 5, Pamph. L. 762.

obtain a stay of execution for the full period allowed by that act; that is, six months where the amount of the judgment does not exceed two hundred dollars, nine months where such amount is above two but not above five hundred dollars, and twelve months where it is above five hundred dollars; the defendant, if not a freeholder, must give security to be approved of by the court, or by a judge thereof, for the sum recovered, together with interest and costs. Such security must now be bail absolute, with one or more sufficient sureties, in double the amount of the debt or damages, interest, and costs recovered, conditioned for the payment thereof in the event that the defendant fail to pay the same at the expiration of the stay of execution.<sup>1</sup> The act does not designate the form or kind of the security; nor whether it shall be by bond or recognisance; whether on the docket or *in pais*; whether it shall be filed in the prothonotary's office or kept by the plaintiff. The practice has been general to enter it on the docket, and for the surety to sign it. It is in some counties drawn more at large than in others, and stated to be for the purpose of obtaining for the defendant the stay of execution allowed by law.<sup>2</sup> A recognisance entered on the docket below the judgment in this form: "S. F., of, &c., bound in the sum of \$3008.98 [double the amount of the judgment], conditioned for the payment of the debt, interest, and costs," signed by him, and attested by the prothonotary's clerk, was held a valid recognisance for stay of execution under the Act of 1806, which, like the present act, did not prescribe the form of the security.<sup>3</sup> But the entry on the docket, directly under the entry of the judgment, in this form: "Defendants offer D. as bail for stay of execution for six months," which was signed by D., was a mere offer of bail which, not appearing to have been accepted by the plaintiff, was not valid as a recognisance under the act.<sup>4</sup> A precedent of a recognisance will be found in Smith's Forms of Precedents.<sup>5</sup>

*Time within which bail must be entered.*—This security must be entered within thirty days from the rendition of the judgment.<sup>6</sup> If entered after the expiration of thirty days, though before execution issued, the court will strike it off.<sup>7</sup> But if the recognisance for the stay of execution be entered into after the expiration of the period limited for the stay, and the plaintiff proceed thereon, he cannot afterwards treat it as a nullity.<sup>8</sup>

*Mode of entering bail.*—The Act of 20th March 1845<sup>9</sup> requires the security to be bail absolute, with one or more sufficient sureties, in double the amount of the debt, or damages, interest, and costs recovered, conditioned for the payment thereof in the event that the defendant fail to pay the same at the expiration of the stay of exe-

<sup>1</sup> Act 20th March 1845, § 1, *Purd.* Dig. 431, pl. 8, *Pamph. L.* 189.

<sup>2</sup> *Commonwealth v. Finney*, 17 S. & R. 283; see remarks of *Husron, J.*; see also, *Bank of Pennsylvania v. Reed*, 1 W. & S. 104.

<sup>3</sup> *Commonwealth v. Finney*, 17 S. & R. 283.

<sup>4</sup> *Bieber v. Beck*, 6 Barr 198.

<sup>5</sup> Page 303.

<sup>6</sup> *Erie Bank v. Compton*, 3 Casey 195.

<sup>7</sup> *Blackwell v. Johnson*, 2 Miles 346.

<sup>8</sup> *Roup v. Waldhower*, 12 S. & R. 24.

<sup>9</sup> *Purd.* Dig. 431, pl. 8, *Pamph. L.*

cution. By bail absolute is meant that in case the defendant fail to pay the debt at the expiration of the stay, the surety shall not, as in special bail, have the alternative of surrendering the defendant to prison in discharge of his obligation, but must himself pay the debt.<sup>1</sup> As to the amount of the debt, &c., recovered, in a case where part of the debt, on which the judgment was founded, had accrued before the defendant's discharge under the Insolvent Law, the court refused to allow him to enter security for that part only which accrued after the discharge.<sup>2</sup>

The defendant, through his counsel, gives notice to the plaintiff's counsel that he will, upon a certain day, and at a certain hour, offer some one, mentioning name, residence, and occupation, as security for the stay of execution in the particular case. At the appointed time the court or any one of the judges examines the proposed surety, and if satisfied the judge signs a paper, very short and informal, signifying that the person therein named is approved as security for the stay of execution. The surety then proceeds to the prothonotary's office, where the recognisance is executed in the presence of the clerk. The security must in all cases be approved by the court, or a judge of the court, and this approval must appear upon the record, otherwise execution may issue.<sup>3</sup> But the want of such approval cannot be taken advantage of by the defendant or his surety; though as the approval is for the benefit of the creditor, he may waive it either expressly or impliedly.<sup>4</sup> The security, however, may be taken by the prothonotary, and afterwards perfected before the court.<sup>5</sup> Under the Act of 1791, authorizing prothonotaries to take bail, &c., the clerk or deputy of a prothonotary was competent to take a recognisance of bail for stay of execution.<sup>6</sup>

If one surety only be presented to the court for approval, he will not be approved unless he shows satisfactorily that he is worth double the amount of the judgment over and above all his debts; and if more than one surety be offered they must show that taken together they are worth double the amount of the judgment above all their liabilities.<sup>7</sup> It is a rule adopted in most of the courts, that no attorney, sheriff's officer, bailiff, or other person concerned in the execution of process, shall become surety for the stay of execution, except by special leave of the court previously obtained.<sup>8</sup>

*Exceptions to bail.*—In the Common Pleas of Philadelphia the plaintiff excepts to the sufficiency of the surety within four days after the expiration of thirty days from the entry of the judgment, and the defendant, within eight days after notice of exception, justifies before the prothonotary, subject to appeal to a judge, giving

<sup>1</sup> *Lerch v. Stichter*, 1 Harris 89, per Smith's Forms 361.  
BELL, J.

<sup>2</sup> *Casey v. Brelsford*, 2 Miles 174.

<sup>3</sup> *Eichman v. Belvidere Bank*, 3 Whart. 68.

<sup>4</sup> *Stroop v. Gross*, 1 W. & S. 139.

<sup>5</sup> *Ibid.*; *Wells v. Bentley*, 3 Barr 324. See the form in such case,

<sup>6</sup> *Commonwealth v. Finney*, 17 S. & R. 282.

<sup>7</sup> *Hollingsworth v. McKean*, 2 Miles 370.

<sup>8</sup> See Walker's Rules, "Attorneys," and "Bail."

twenty-four hours' notice of justification.<sup>1</sup> And this is also the practice in the *Nisi Prius*.<sup>2</sup>

The death of a surety for stay is not ground for requiring additional security to be given.<sup>3</sup> And where the surety gave bond to apply for the benefit of the insolvent laws, the court refused the plaintiff leave to issue execution against the defendant.<sup>4</sup>

*The effect of entering bail for stay*, may be considered in several aspects as follows:

*The time of the stay*.—The period for which stay of execution can be had, varies with the amount of the judgment: it is six months for sums under two hundred dollars; nine months for sums between two and five hundred dollars; and twelve months for sums above five hundred dollars.<sup>5</sup> And in estimating this amount the costs are to be added to the amount of the judgment.<sup>6</sup> And where through mistake of the prothonotary the recognisance was taken for six months instead of nine, the court allowed the defendant to enter security in a new recognisance for nine months from the original return day; without prejudice to any right which the plaintiff might have in regard to the former recognisance after the expiration of the nine months.<sup>7</sup>

The time of the stay is to be computed from the first day of the term to which the action was commenced.<sup>8</sup> In an appeal to the Common Pleas from a justice, the stay is to be computed from the first day of the term to which the appeal was entered.<sup>9</sup> The stay is to be computed from the return day to which the original process was returnable in the District Courts of Philadelphia<sup>10</sup> and Alleghany,<sup>11</sup> and the courts of the sixth,<sup>12</sup> fourteenth,<sup>13</sup> and tenth<sup>14</sup> judicial districts. This is the monthly return day.<sup>15</sup> And where more than one summons was issued, the period of the stay is to be computed from the return day of the original process which was effective in bringing the defendant into court.<sup>16</sup> And as since the decision in *Woods v.*

<sup>1</sup> Rules C. P. IX., Sect. 3, Walker's Rules 48.

<sup>2</sup> Rules S. Ct. at N. P. VII., Sect. 4, Walker's Rules 104.

<sup>3</sup> *Wriggins v. Stevens*, 2 Miles 427.

<sup>4</sup> *Warren v. Bancroft*, Ibid. 95.

<sup>5</sup> Act 16th June 1836, § 3, *Purd. Dig.* 431, pl. 4, *Pamph. L.* 762.

<sup>6</sup> *Hill v. Crean*, 4 P. L. J. 115.

<sup>7</sup> *Welsh v. Brown*, 2 Miles 108.

<sup>8</sup> Act 16th June 1836, § 3, *Purd. Dig.* 431, pl. 4, *Pamph. L.* 762.

<sup>9</sup> *Woods v. Conner*, 6 Barr 430.

<sup>10</sup> Act 28th March 1835, § 1, *Purd. Dig.* 336, pl. 7, *Pamph. L.* 88.

<sup>11</sup> Act 12th June 1839, § 4, *Purd. Dig.* 343, pl. 54, *Pamph. L.* 261.

<sup>12</sup> Act 17th April 1856, § 4, *Purd. Dig.* 164, pl. 156, *Pamph. L.* 396.

<sup>13</sup> Act 6th June 1839, § 2, *Purd. Dig.* 803, pl. 8, *Pamph. L.* 254.

<sup>14</sup> Act 20th February 1854, § 2, *Pamph. L.* 87.

<sup>15</sup> *Smith v. Barncastle*, 2 Miles 74.

<sup>16</sup> *Morris v. Cameron*, D. C. Phila., Dec. 15th 1849. Why security for stay should not be entered from the return day of the original process. *Per curiam*. In this case a summons was issued returnable to the 1st Monday of October, to which the sheriff made return of "*nihil habet*." An alias summons was issued returnable to the 1st Monday of November, to which the sheriff returned "served." Afterwards a judgment was entered for want of an affidavit of defence, and the defendant having tendered security for stay of execution, which has been approved, the question has now been presented, from what period the stay of execution shall date—the return day of the first, or the second summons? The third section of the Act of 16th June 1836, relating to executions (*Purd. p.* 442), enacts that the stay of execution shall be computed "from the first day of the term to which the action was commenced;"

Conner, the legislature have provided monthly return days for appeals from aldermen in Philadelphia,<sup>1</sup> it would seem that now the period of stay upon such appeals should be computed not from the first day of the term, but from the monthly return day to which such appeal was entered.

As regards the plaintiff, the effect of entering bail is to suspend his right to take out execution until the period of the stay has determined. A *fi. fa.* issued during this period is a nullity, and trespass lies against the plaintiff or prothonotary for issuing it.<sup>2</sup> If, however, the plaintiff issues execution before the expiration of the stay, and, under a menace of levying the execution, obtains part of the debt from one of the defendants, this does not annul the recognisance.<sup>3</sup> If execution issue before the expiration of the stay, the court will set it aside upon a summary application; and questions of fact arising on such motion may be decided by the court, or they may direct an issue at their discretion.<sup>4</sup>

The entry of security discharges the special bail where the suit was commenced by *capias*.<sup>5</sup> As regards his remedy he may after the termination of the stay proceed to issue execution against the defendant, or he may proceed by *scire facias* or debt against the bail,<sup>6</sup> in the manner hereafter explained,<sup>7</sup> or he may proceed against both at the same time, and may proceed against the bail even after levying on the real estate of the defendant, but

and by the proviso of the first section of the Act of 28th March 1835: "An Act to establish the District Court for the city and county of Philadelphia," (Purd. 265), it is declared that the stay of execution allowed by the seventh section of the Act entitled "An Act to regulate arbitrations and proceedings in courts of justice, passed 21st March 1806, shall count from the return day to which the original process issued was returnable." Though the seventh section of the Act of 1806 had been superseded and supplied by the third section of the Act of 1836, it is plain that this provision, though it refers to an act repealed by having been supplied, does not thereby fall to the ground, but stands good still, and is to be applied to cases under the new act. By the strict letter of both these acts, the stay of execution would have to be computed from the return day of the first summons, 'ut when we look at the reason and spirit which is to be liberally construed in favor of the indulgence therein accorded to the defendant, the conclusion must be that it was the intention of the legislature to accord to the defendant a certain delay, proportional to the sum received, to be computed from the time when he was first called on to answer, and had an opportunity, by at once confessing its justice, to avoid further trouble and

expense. We think, therefore, that it is from the return day of the original process which is effective in bringing the defendant into court, that the stay ought to be computed. The reason of this determination will be more readily recognised if it be considered that an alias summons, according to our practice, may be issued at any indefinite period of time, grounded upon an original summons, the continuance being mere matter of form, which may be filled up afterwards. In this way the bar of the Statute of Limitations may be avoided. But in such case, if the law relating to executors were differently construed, the property of the defendant would be liable to be seized and swept from him at a sacrifice, without allowing him that time to look around and make provision to save himself, which it was evidently the great aim of the act to give him.

R. D.

<sup>1</sup> Act 1st May 1861, § 2, Purd. Dig. 601, pl. 75, Pamph. L. 535.

<sup>2</sup> Milliken v. Brown, 10 S. & R. 188.

<sup>3</sup> Ibid.

<sup>4</sup> Banning v. Taylor, 12 Harris 289.

<sup>5</sup> Roup v. Waldhouer, 12 S. & R. 24.

<sup>6</sup> *Scire facias* and debt have been brought promiscuously: Gratz v. Bank, 17 S. & R. 282, per HUSTON, J.

<sup>7</sup> See Vol. II., "Scire Facias against Bail."

he can recover but one satisfaction: the remedies being concurrent, the doctrine of election is not applicable.<sup>1</sup>

*The defendant* by entering security for the stay does not waive his right to a writ of error.<sup>2</sup> It is, therefore, now a question whether, if in such a case the judgment be reversed, and a *venire de novo* awarded, the plaintiff loses the benefit of the security.<sup>3</sup>

*The surety*.—In case the defendant does not discharge the judgment at the expiration of the stay, the recognisance is forfeited, and the plaintiff may proceed thereon against the surety by *scire facias* in the manner hereafter explained.<sup>4</sup> So identified with and undistinguishable from his principal does the bail become, that after judgment obtained against them on the recognisance, a surety on the original obligation, who has paid part of the debt, is entitled to an assignment of the judgment against the defendant and his bail, to indemnify himself for the amount so paid.<sup>5</sup> Where the surety had purchased a prior judgment against the defendant, for a valuable consideration, and not for the purpose of indemnifying himself against the payment of the judgment on the recognisance, the plaintiff in the latter judgment, upon the distribution of the proceeds of the defendant's land, has no claim either legal or equitable upon the prior judgment in the hands of the surety or his assignee.<sup>6</sup> A surety for stay of execution who *pays* the judgment against the defendant, cannot be substituted as plaintiff in such judgment, and thereby acquire priority over other judgment-creditors of the defendant.<sup>7</sup> But it seems, though the case is not very clearly reported, that he is entitled to such substitution, as against the general creditors of a defendant who had made an assignment for the benefit of creditors.<sup>8</sup> And if he *purchase* the judgment from the plaintiff, and takes an assignment to himself, he can claim the proceeds of the defendant's real estate as against subsequent judgment-creditors.<sup>9</sup> Where no third persons could be affected by such substitution, it seems that a surety who *pays* the judgment is entitled to substitution as against the defendant.<sup>10</sup>

In a suit on the recognisance against the surety, his principal is not a competent witness for him.<sup>11</sup>

*Discharge of surety*.—The bail for stay of execution is, like other sureties, liable to be discharged by acts of the creditor. The chief ground of discharge is giving time to defendant; though a mere gratuitous indulgence by the creditor without such consideration as would make it binding upon him will not discharge the surety:<sup>12</sup> so releasing the defendant, or surrendering securities for the debt, will

<sup>1</sup> Patterson v. Swan, 9 S. & R. 16.

<sup>2</sup> Rauck v. Becker, 12 S. & R. 412, DUNCAN, J., diss.

<sup>3</sup> Ibid. 426.

<sup>4</sup> Vol. II., "Scire Facias against Bail."

<sup>5</sup> Burns v. Huntingdon Bank, 1 Pa. R. 398; 2 Verm. 608.

<sup>6</sup> Gardner's Appeal, 7 W. & S. 295.

<sup>7</sup> Armstrong's Appeal, 5 Ibid. 352.

<sup>8</sup> Brewer's Appeal, 7 Barr 333.

<sup>9</sup> Hartman's Appeal, 6 Ibid. 76.

<sup>10</sup> Armstrong's Appeal, 5 W. & S. 356, per SERGEANT, J.

<sup>11</sup> Milliken v. Brown, 10 S. & R. 188.

<sup>12</sup> Rhoads v. Frederick, 8 Watts 448; Todd v. Blair, S. Ct. at Chambersburg, 1827, stated in United States v. Simpson, 3 Pa. R. 440, per GISSON, C. J.



discharge the surety: so payment by the debtor discharges the surety.<sup>1</sup>

Where the principal was the accommodation endorser of a note, the surety is discharged by the payment of a judgment against the endorsee.<sup>2</sup>

*Waiver of stay of execution.*—As the statutory stay of execution is a privilege of the defendant it may be waived, and nothing is more common in bonds and warrants of attorney, and other instruments, than the insertion of such a waiver.

The words "with stay of execution till the day of payment," do not amount to an express waiver beyond that day.<sup>3</sup>

*c. Statutory stay in special cases.*—*Soldiers*, mustered into the service of this State, or of the United States, are exempted from all civil process during the term for which they are engaged in such service, and for thirty days after their discharge therefrom.<sup>4</sup> This section is constitutional: the extreme limit of the stay is three years and thirty days, and a re-enlistment at the expiration of the first term would not renew the stay: it relates to all forms of execution, as well as original and mesne process.<sup>5</sup> But it does not apply to a soldier mustered into service "during the war," under the Act of Congress of 25th July 1861,<sup>6</sup> or if applicable is unconstitutional, for the period is too indefinite to be reasonable.<sup>7</sup>

Under this act the court will set aside a levy on real estate belonging to a soldier in service under a *fi. fa.* issued against a former owner of the land.<sup>8</sup>

The proviso to section 1 of Act 21st May 1861, granting a stay of execution on a judgment due by a soldier, notwithstanding a waiver, is unconstitutional.<sup>9</sup> And an attachment execution is an execution within the act.<sup>10</sup>

*Executors and administrators* of a deceased defendant must, as we have seen, be substituted in his place before execution can be issued on the judgment.<sup>11</sup> When this has been done execution may issue immediately on the judgment against the administrator, notwithstanding that in the 27th section of the act<sup>12</sup> the substituted executor or administrator is allowed one term's continuance of the proceedings.<sup>13</sup> The 27th section applies to proceedings depending, the 33d section to judgments obtained against the decedent. But a judgment of substitution does not prevent a stay in order to let

<sup>1</sup> See the cases collected in Whart. Dig., "Surety," III.

<sup>2</sup> *Marsh v. Consolidation Bank*, 12 Wright 510.

<sup>3</sup> *Huntzinger v. Brock*, 3 Grant 243.

<sup>4</sup> Act 18th April 1861, § 4, *Purd. Dig.* 735, pl. 167, *Pamph. L.* 409.

<sup>5</sup> *Breitenbach v. Bush*, S. Ct., 8 Wright 313; *Coxe's Executor v. Martin*, *Ibid.* 322.

<sup>6</sup> *Purd. Dig., Supp.* 1109, § 143; 12 *Stat. at Large* 274.

<sup>7</sup> *Clark v. Martin*, S. Ct., N. P., per *WOODWARD, J.*, 20 *Leg. Int.* 180; s. c., 3 Grant 393; s. c., 13 Wright 299.

<sup>8</sup> *Jefferis v. Shearer*, C. P. Perry, 20 *Leg. Int.* 245.

<sup>9</sup> *Billmeyer v. Evans*, 4 Wright 324; *Lewis v. Lewis*, 11 *Ibid.* 127.

<sup>10</sup> *Ibid.*

<sup>11</sup> Act 24th February 1834, § 33, *Purd. Dig.* 288, pl. 99, *Pamph. L.* 79. As to the mode of making the substitution see Vol. II., "Scire Facias on Change of Parties."

<sup>12</sup> *Purd. Dig.* 286, pl. 89, *Pamph. L.* 77.

<sup>13</sup> *Wallace's Administrator v. Holmes*, 4 Wright 429.

the administrator apply for a sale under the direction of the Orphans' Court, as provided by the 35th and 36th<sup>1</sup> sections of the act.<sup>2</sup> A *levari facias* on a mortgage is not within the 35th section.<sup>3</sup> By the 53d section of the act, after judgment against an executor in an action by a legatee, he may aver the want of assets to pay all the debts and legacies, and thereupon execution shall be stayed until an account has been taken in the Orphans' Court, which the executor may be compelled by attachment to do.<sup>4</sup> It would seem that a defendant not sued as executor, nor for a legacy *eo nomine*, is not entitled to this stay.<sup>5</sup>

*Mechanic's lien.*—If execution issues against a piece of ground upon which a building has been erected, which is subject to mechanics' liens, before the boundaries of the lot or curtilage which ought to be appurtenant thereto have been designated, the court, upon application, may stay such execution until such designation shall be made, and thereupon may order the sale to proceed, in such manner and for such part or parts, and in such parcels as shall be most convenient for the administration of equity among all parties interested.<sup>6</sup> This is not confined to executions on mechanics' liens, and the execution of a prior judgment-creditor will be stayed on the petition of a subsequent mechanics' lien-creditor until the curtilage has been set out.<sup>7</sup>

*Stay prohibited.*—In Luzerne county no stay of execution is allowed on judgments for less than \$100, recovered for wages of mechanics, miners, laborers, or clerks, for labor or services rendered in the business of mining coal.<sup>8</sup> And this has since been extended to the counties of Schuylkill, Northumberland, Somerset, Carbon, Washington, and Dauphin.<sup>9</sup>

*Power of court to control executions.*—The powers of the court in relation to executions are very extensive. They may suspend the operation of the writ, or set it aside altogether, as will hereafter be shown;<sup>10</sup> or they may restrict its effect to a particular tract of land; or they may control it in other ways, so as to prevent injustice. Before return made, courts always interfere to prevent injustice, but they cannot alter the effect of a return, although, in a proper case, they may enlarge the time for making it, or may grant leave to amend it.<sup>11</sup> But a judge has no power to order an execution to be returned before the return day; such order is void for want of power to make it.<sup>12</sup>

The court will control the execution by the tenor of the evidence upon which the judgment was obtained.<sup>13</sup>

<sup>1</sup> Purd. Dig. 288, pl. 101; 289, pl. 102, Pamph. L. 80.

<sup>2</sup> Wallace's Administrator v. Holmes, 4 Wright 429.

<sup>3</sup> Dundas v. Leiper, D. C. Phila., 1 Phila. Rep. 569.

<sup>4</sup> Act 24th February 1834, § 53, Purd. Dig. 303, pl. 188, Pamph. L. 83.

<sup>5</sup> See Hall v. Hurford, D. C. Lancaster, 4 P. L. J. 44.

<sup>6</sup> Act 16th June 1836, § 8, Purd. Dig. 710, pl. 9, Pamph. L. 697.

<sup>7</sup> Flickinger v. Huber, 7 Casey 344.

<sup>8</sup> Act 30th March 1859, § 6, Pamph. L. 304.

<sup>9</sup> By Act 30th March 1859, § 5, Pamph. L. 318.

<sup>10</sup> See post, "Staying and Setting Aside, &c."

<sup>11</sup> Mentz v. Hamman, 5 Whart. 155, per Rogers, J. And see post, "Amendment."

<sup>12</sup> Irons v. McCuewan, 3 Casey 196.

<sup>13</sup> Irwin v. Shoemaker, 8 W. & S. 77.

Executions on judgments by confession without suit are peculiarly under the equitable control of the court out of which they issue.<sup>1</sup> Thus they will permit an execution to issue on a judgment for a stated sum, confessed to plaintiff as an indemnity, without a *scire facias*, suggestion, or other proceeding, to ascertain the damages.<sup>2</sup> And where a judgment was confessed payable in a certain time with interest, payable annually, conditioned that on default for sixty days in the payment of interest the whole debt became due and payable, the court held that an execution issued five months after the first year's interest accrued, without any suggestion on the record of non-payment, was *primâ facie* regular, but would be set aside on proof of payment, according to the condition.<sup>3</sup> So on a bond with warrant payable in instalments, the times of the payment being specified in the entry of judgment, execution might issue without obtaining leave of the court; but the court has control of such executions, and if payment be suggested it may award an issue.<sup>4</sup>

So if a plaintiff in a judgment by confession, with a special agreement annexed restricting the execution to a certain specified tract, attempts, in violation of his agreement, to levy on other lands of the defendant, the court will interfere, and set aside the writ on motion.<sup>5</sup> And they will enforce such an agreement where the judgment is obtained upon verdict.<sup>6</sup>

The courts will interfere in other cases to restrict an execution to a particular tract. Thus, where some of the tracts bound by a general judgment were afterwards aliened by the defendant, and the remaining lands are sufficient to satisfy all the liens, the court will interfere to prevent a levy on the lands aliened.<sup>7</sup> So, where judgment for arrears of ground-rent has been obtained against the executor of the covenantor, who had aliened the land and died before the rent became due, the court will restrict the execution to the land out of which the rent issues.<sup>8</sup>

But where an executrix, being indebted to one of the legatees, confessed a judgment to a creditor of the legatee, and took a receipt from the legatee for so much paid, to be accounted for by him on a settlement of his accounts and of the estate, it was held that the plaintiff had the right to levy his execution on the personal property of the estate, and was not bound to wait until there had been a settlement of accounts between his original debtor and the estate, and a decree of the court below, restricting the execution to the estate of the executrix, was reversed.<sup>9</sup>

Where the judgment is on a note payable in the notes of a par-

<sup>1</sup> Cox v. Rodbard, 3 Taunt. 75; Austerbury v. Morgan, 2 Ibid. 195; Kinnersley v. Musser, 5 Ibid. 264; 2 Archb. Pract. 26; Gray's Heirs v. Coulter, 4 Barr 190; Skidmore v. Bradford, Ibid. 300; Montelius v. Montelius, 5 P. L. J. 88; s. c., Bright. Rep. 79; McCann v. Farley, 2 Casey 173. And see Lewis v. Smith, 2 S. & R. 155.

<sup>2</sup> McCann v. Farley, 2 Casey 173.

<sup>3</sup> Collins v. Webster 2 Wright 150.

<sup>4</sup> Chambers v. Harger, 6 Harris 15.

<sup>5</sup> Snevely v. Tarr, D. C. Phila., 1 Phila. Rep. 220.

<sup>6</sup> Irwin v. Shoemaker, 8 W. & S. 75.

<sup>7</sup> Nailer v. Stanley, 10 S. & R. 450; Cowden's Estate, 1 Barr 279; Mevey's Appeal, 4 Ibid. 80. See *ante*, "What is liable to Execution," and *post*, Sect. IV., "Manner of Levy."

<sup>8</sup> Williams's Appeal, 11 Wright 283.

<sup>9</sup> Miller v. Ege, 8 Barr 352.

ticular bank, the court will, under its equitable powers, so control the execution as to prevent injustice.<sup>1</sup> So where the judgment is on bank notes the court can so control the execution as to compel the delivering up of the notes.<sup>2</sup>

Where a note was lost after commencement of an action upon it, though it is not necessary for the plaintiff to furnish indemnity against it before judgment, yet the court may restrain the execution till indemnity be given.<sup>3</sup>

Where a judgment has been transferred to another county, the court in which the primary judgment was obtained can alone take any action operating on the judgment itself; and if that court direct satisfaction to be entered on payment of the money into court, all further process on the secondary judgment is to be arrested, except for its own costs in a proper case.<sup>4</sup>

The court of the county to which a *testatum fi. fa.* is directed, has no control over it: the process is for every purpose under the control of the court whence it issues.<sup>5</sup>

An attachment-execution, as collateral to the old modes of execution, is under the control of the court, so far as to see that it is not used vexatiously, and that the garnishee shall run no risk of being compelled to make double payment.<sup>6</sup>

*Staying and setting aside executions by the court.*—The cases in which a court will open a judgment have been already considered, and in general whenever the judgment is opened or set aside, the execution falls. But a rule to show cause why a judgment should not be opened, does not stay the proceedings without an order to that effect; and the sheriff is liable for goods previously levied on under such judgment, which, by his neglect to sell, were levied on and sold under a subsequent execution, and the proceeds paid to the plaintiff in that suit.<sup>7</sup>

It may be considered as settled law that, independently of those cases where the execution is on its face irregular, where an execution has been issued without leave, and in violation of the agreement of the parties, the court has a power, which it is bound to exercise, to set it aside or stay proceedings until the plaintiff does justice by carrying into effect the terms and stipulations of an agreement.<sup>8</sup> Thus, where land was purchased at a sheriff's sale for a part of the amount of the judgment, under an agreement that it was to be held as collateral security for the whole debt, and, in violation of the agreement, an *alias fi. fa.* was taken out for the residue, it was held that the proper course was to set aside the writ, or stay proceedings on it, not to open the judgment to let the defendant into a defence on the merits.<sup>9</sup> And executions upon judgments entered upon bond and warrant of attorney are controlled by the equitable powers of

<sup>1</sup> Lowry v. Lumbermen's Bank, 2 W. & S. 210.

<sup>2</sup> Kase v. Kase, 10 Casey 128.

<sup>3</sup> Bank of United States v. Thayer, Ibid. 448.

<sup>4</sup> Spang v. Commonwealth, 2 Jones 358.

<sup>5</sup> Bisbing v. Graham, 2 Harris 14.

<sup>6</sup> McCann v. Farley, 2 Casey 173;

<sup>7</sup> King v. Nimick, 10 Casey 297.

Irons v. McQuewan, 3 Ibid. 196; Patterson v. Patterson, Ibid. 40; Loomis v. Lane, 5 Ibid. 242.

<sup>8</sup> Commonwealth v. Smith, C. P. Dauphin, 4 Phila. Rep. 419.

<sup>9</sup> Harrison v. Soles, 6 Barr 393.

the court issuing them, in such manner that no injustice is done to the defendant.<sup>1</sup> Every court having jurisdiction to hear and determine civil causes, has control over its own process of execution, in a summary manner and without the intervention of a jury.<sup>2</sup> And the right of a Court of Common Pleas, to stay an execution for a definite period of time, or to prevent one from issuing, has been frequently recognised, and is common in practice.<sup>3</sup> A *testatum fi. fa.* cannot be stayed by the court to which it is directed; the writ is for every purpose under the control of the court whence it issues.<sup>4</sup> But where a judgment has been transferred to another county, and execution issued therein, a stay of execution granted in the county where the judgment was obtained, will not affect the process in the other county.<sup>5</sup> The application should be made in the first instance to the court whence the execution issued, before coming into the Supreme Court for relief by writ of error.<sup>6</sup>

A judge may stay an execution upon good and sufficient grounds shown, but it should be with a stipulation that the lien be preserved.<sup>7</sup> The authority exercised by a judge at chambers, in a cause pending, is the authority of the court itself, and may be enforced by attachment, because disobedience of a judge's order is a contempt of court, and is punishable as such. This jurisdiction is *ex necessitate rei* to prevent oppression, and to facilitate the interlocutory proceedings of suits at law, and embraces a variety of important subjects.<sup>8</sup>

The proper mode of proceeding in most cases, is by summons in the nature of a rule *nisi*, fixing a day for a hearing, and served on the opposite party. Without this the judge ought not to interfere, unless the order sought is of course. An order staying execution without notice or a hearing is void as regards the plaintiff.<sup>7</sup> But the want of notice to the plaintiff would not justify the officer in refusing to obey the order.<sup>9</sup>

On a motion to set aside, the court will not decide questions of defendant's title.<sup>9</sup>

The court will not under ordinary circumstances open a judgment and set aside an execution, unless the party asking relief applies immediately on receiving notice of the levy: he cannot wait until levy and condemnation, or if he does, good reason should be shown for the delay.<sup>10</sup> Propositions for settlement made on his part and declined by the plaintiff amount to nothing.<sup>11</sup>

A mere general creditor, who has not obtained judgment, cannot intervene to stop an execution which may indeed be fraudulent as to him, but which is good between the parties: none but an execution-creditor who has a lien, or an assignee for the benefit of creditors, who would be entitled to the goods in case the fraudulent execution

<sup>1</sup> McCann v. Farley, 2 Casey 173.

<sup>2</sup> Loomis v. Lane, 5 Ibid. 242.

<sup>3</sup> Patterson v. Patterson, 3 Ibid. 40.

<sup>4</sup> Commonwealth v. Smith, C. P. Dauphin, 4 Phila. Rep. 419.

<sup>5</sup> Baker v. King, 2 Grant 254. See King v. Nimick, 10 Casey 297.

<sup>6</sup> Duncan v. Harris, 17 S. & R. 436.

<sup>7</sup> Irons v. McQuewan, 3 Casey 196.

<sup>8</sup> Commonwealth v. Magee, 8 Barr 246.

<sup>9</sup> Seitzinger v. Fisher, 1 W. & S. 295.

<sup>10</sup> McQuillan v. Hunter, D. C. Phila., 1 Phila. Rep. 49.

<sup>11</sup> Chillas v. Snyder, D. C. Phila., 1 Phila. Rep. 289.

were set aside, has any right to ask the interposition of the court: it seems there is no difference in this respect between the case of a judgment confessed by way of preference by a person in insolvent circumstances, and other cases.<sup>1</sup>

A judge cannot order an execution to be returned before the return day named in the writ, proceedings to be stayed in the mean time: such an order is void for want of authority to make it.<sup>2</sup>

A court, upon motion to set aside an execution, may direct an issue to ascertain the facts; but this is for its own satisfaction, the parties have no right to demand it.<sup>3</sup>

It is not cause for setting aside an execution that it was levied on land for which the defendant had no title, or that the lien of the judgment had been lost by lapse of time;<sup>4</sup> but in such case the court will set aside the levy on the land, as to which the lien of the judgment had expired, leaving the writ to stand as to personalty:<sup>5</sup> hence, where on application of assignees of real estate the court stayed a *venditioni* issued on a judgment obtained after the assignment, the proceedings were reversed by the Supreme Court, who refused at the same time to inquire into the validity of the assignment, holding that the proper mode of testing it would be in an ejectment between the sheriff's vendee and the assignees.<sup>6</sup> So the court will not, on motion to set aside a *fi. fa.*, inquire into the title of a third person, who claims the lands levied on, but will leave him to his ejectment; nor will the court in such case inquire into the existence of a lien on the land, though they would apply the proceeds to it, if valid, when the money is brought into court.<sup>7</sup> And where a legacy was bequeathed upon condition that the estate should prove sufficient to pay prior legacies, the court will not interfere to stay execution by the executors against the legatee on an antecedent debt, except where it is perfectly clear that the estate will be large enough to pay the legacy.<sup>8</sup> After a *fi. fa.* has been executed upon land, the court will not set it aside on the ground that since the inquisition sufficient personal property has been found to satisfy the execution.<sup>9</sup>

The court will set aside an execution issued after more than thirteen years from the date of the judgment without a previous *scire facias*.<sup>10</sup> Where the judgment has been attached by a creditor of the plaintiff, the court will stay proceedings until the plaintiff pays the attaching-creditor or pushes his claim to a final determination.<sup>11</sup> And where the defendant subsequent to the judgment has obtained a discharge in bankruptcy, an execution may be summarily set aside as to his personal property.<sup>12</sup> But it is error

<sup>1</sup> Ludlow v. Dutton, D. C. Phila., 1 Phila. Rep. 226.

<sup>2</sup> Irons v. McQuewan, 3 Casey 196.

<sup>3</sup> Loomis v. Lane, 5 Casey 242. See Banning v. Taylor, 12 Harris 289.

<sup>4</sup> Seitzinger v. Fisher, 1 W. & S. 293.

<sup>5</sup> Ibid.

<sup>6</sup> Neel v. Bank of Lewistown, 1 Jones 16.

<sup>7</sup> Harrison v. Waln, 9 S. & R. 318.

<sup>8</sup> Dunn's Executors v. The Am. Phil. Society, 2 Barr 75.

<sup>9</sup> Hunt v. McClure, 2 Yeates 387.

<sup>10</sup> Comley v. Rissel, C. P. Phila., 1 Phila. Rep. 402.

<sup>11</sup> Paxson v. Sanderson, D. C. Phila., 1 Phila. Rep. 177; Daly v. Derringer, D. C. Phila., 1 Phila. Rep. 324.

<sup>12</sup> Curtis v. Slosson, 6 Barr 265.

to stay proceedings on an execution because the defendant has made an assignment for benefit of creditors.<sup>1</sup> And where a joint judgment was entered against two, and subsequently was opened as to one of the defendants, it is error to permit execution to issue against the other defendant, until the issue as to the liability of the first has been disposed of.<sup>2</sup>

The general rule is that the plaintiff may have as many executions at the same time as the law affords, and pursue each until satisfaction is obtained on one: therefore, it is error for the court to set aside an attachment-execution against bank stock of the defendant, standing in the name of another, on the ground that a previous attachment-execution on the same judgment against deposits was still outstanding.<sup>3</sup>

An execution issued before the stay of execution has expired, is irregular, and will be set aside by the court or reversed on error: still it is not void, but, like a judgment erroneously entered, is valid until reversed or set aside, nor can its validity be questioned by another execution-creditor who sues the sheriff for the proceeds, or in any other case collaterally, except where there is collusion between the plaintiff and defendant in fraud of a third person.<sup>4</sup>

Where the defendant, applying for a stay of execution, alleges that the plaintiff is indebted to him upon an unliquidated account, and is insolvent, the court would perhaps refuse to set aside on that ground; but an offer by the plaintiff to give security to the amount of the judgment sought to be enforced, would fully meet the allegation of the defendant.<sup>5</sup> So where the judgment was assigned to secure money lent to the defendant, which he covenanted by articles of agreement to repay on a certain day, the court will not stay an execution on the judgment in order to give the defendant time to obtain a verdict against the equitable plaintiff for alleged breaches of his covenants in the same articles; though they would perhaps interfere if the defendant alleged payment, or anything which in its nature admitted of liquidation.<sup>6</sup>

Where a court has jurisdiction to determine a motion and set aside an execution, its decision is final, and cannot be re-examined collaterally: the remedy is by writ of error or appeal, and if neither lies it is without remedy.<sup>7</sup> A writ of error lies from an order staying an execution indefinitely, for this is the final adjudication of the party's right, and otherwise he would be deprived of his judgment, or the fruits of it, without remedy.<sup>8</sup> But an order staying execution, subject to such further order of the court as the justice of the case may require, is not final, and is not the subject of a writ of error.<sup>9</sup>

The court is bound, upon the application of executors or adminis-

<sup>1</sup> *Neel v. Bank of Lewistown*, 1 Jones 18; see *Stewart v. Coder*, *Ibid.* 91.

<sup>2</sup> *Struthers v. Lloyd*, 2 Harris 216.

<sup>3</sup> *Pontius v. Nesbit*, 4 Wright 309.

<sup>4</sup> *Stewart v. Stocker*, 13 S. & R. 203.

<sup>5</sup> *Patterson v. Patterson*, 3 Casey 40.

<sup>6</sup> *Dunlop v. Speer*, 3 Binn. 169.

<sup>7</sup> *Tassey v. Church*, 6 W. & S. 466; *Loomis v. Lane*, 5 Casey 242; *Pontius v. Nesbit*, 4 Wright 309.

<sup>8</sup> *Patterson v. Patterson*, 3 Casey 40; *O'Hara v. Pennsylvania Railroad Co.*, 2 Grant 241.

<sup>9</sup> *O'Hara v. Pennsylvania Railroad Co.*, 2 Grant 241.

trators, to stay an execution issued on a judgment against decedent, or his personal representatives, if it appear that the personal estate is insufficient, such stay to be until the personal representatives have applied to the Orphans' Court for the sale of the real estate.<sup>1</sup>

The refusal of the court to set aside an execution is error;<sup>2</sup> and this rule embraces a *fi. fa.* improvidently issued for costs not legally due, if that be apparent of record.<sup>3</sup> But such refusal is not the subject of review on writ of error, where there is nothing on the record to show irregularity.<sup>4</sup>

When an execution after having been executed is reversed for irregularity, it is a matter of course to award restitution of the money levied on the execution: and the liberality of courts is such that when executions have been irregularly issued or executed, the court on mere motion will set aside the proceedings, and order the money levied to be restored to the party.<sup>5</sup>

*Injunction.*—In courts of general equity jurisdiction, injunctions are constantly granted to stay proceedings at law; but under our restricted equity powers, it is obvious that such a bill can seldom be sustained: for however inequitable under the peculiar circumstances of the case, it cannot be contrary to law for a party to pursue his legal remedy. And there is the less occasion for the exercise of such a jurisdiction in Pennsylvania, because here, on making out a case entitled to relief, the courts have power to open the judgment and let the defendant into a defence, or to direct an issue to try the right of the party to such equitable relief.<sup>6</sup>

An injunction has been granted to restrain the creditor of a lunatic from levying upon his personal property in the hands of his committee;<sup>7</sup> and to restrain an execution against the rolling-stock and equipments of an insolvent railroad company which has mortgaged the stock and equipments: and if there be any doubt as to the authority to mortgage, the court will not decide this upon the application for an injunction, but will enjoin the sheriff from selling the mortgaged property, directing that the lien of the *fi. fa.* shall continue till further order.<sup>8</sup> But an injunction to restrain proceedings by a judgment-creditor will not be granted on the application of another judgment-creditor, made upon the ground that complainant's interest would be jeopardized by the sale; nor on the application of the debtor, on the ground that a cross-demand is in suit against the creditor.<sup>9</sup> Nor will a bill lie by the assignee of a mortgage against a judgment-creditor of mortgagor, to restrain the latter from proceeding on his judgment, and to credit complainant with certain chattels alleged to have been received in part payment, on

<sup>1</sup> Act 24th Feb. 1834, § 35, *Purd. Dig.* 288, pl. 101, *Pamph. L.* 79.

<sup>2</sup> 1 *Ld. Raym.* 98; *Cassell v. Duncan*, 2 S. & R. 57.

<sup>3</sup> *Barnet v. Ihrle*, 1 *Rawle* 53. Costs are not legally ascertained until taxation: *Harger v. Commonwealth*, 2 *Jones* 251.

<sup>4</sup> *Lewis v. Amor*, 3 *Barr* 460; *Neil v. Tate*, 3 *Casey* 208.

<sup>5</sup> *Cassell v. Duncan*, 2 S. & R. 58, per *YEATES, J.*

<sup>6</sup> *Bright. Eq. Juris.*, § 283.

<sup>7</sup> *Eckstein's Estate*, 1 *Pars.* 59; *Wright's Appeal*, 8 *Barr* 57.

<sup>8</sup> *Loudenslager v. Benton*, N. P., 4 *Phila. R.* 382.

<sup>9</sup> *Middleton v. Middleton*, N. P., 15 *Leg. Int.* 349.



the ground that the judgment-creditor had notice of the prior unrecorded mortgage before the credit was given: the complainant might have all the relief he was entitled to by applying to the court as *terre-tenant* before the sale, to open the judgment on the ground that part had been paid; or after the sale by ruling the money into court, and raising before an auditor the questions in the bill.<sup>1</sup>

Where the legal owner of land has an equity to restrain a judgment-creditor of a former owner from resorting to the land for payment of his judgment, he must do so by original bill in equity; he has no right to intervene in the suit at law to which he is not a party.<sup>2</sup>

The Court of Common Pleas being a court of limited equity jurisdiction, will not interfere to stay proceedings by attachment-execution against an insolvent canal corporation.<sup>3</sup>

The Common Pleas of Philadelphia as a court of equity, has power to restrain the plaintiff in a suit at law in the District Court from issuing an execution out of that court.<sup>4</sup>

A court of equity may restrain an execution issued against a corporation, but not where the complainant, though nominally a stockholder, is really a creditor seeking to restrain another creditor from obtaining satisfaction by means of a prior levy upon the corporation effects.<sup>5</sup> A stockholder, who has consented to the creation of a debt by the corporation, is not entitled to an injunction against an execution issued thereon.<sup>6</sup> One who under a resolution of the corporation has sold his stock to the corporation, taking their judgment-note for the price, is not a stockholder entitled to an injunction to restrain an execution against the corporation.<sup>7</sup>

5. *To what time the writ relates, and what it binds.*

At common law, the *feri facias* had relation to its *teste* and bound the defendant's goods from that time, so that if the defendant had afterwards sold the goods, though *bond fide* and for a valuable consideration, they were still liable to be taken in execution into whose hands soever they came: the inconvenience of this was remedied by the stat. 29 Car. II. c. 3, § 16, which provided that executions should thenceforth bind the property of the goods of the defendant only from the time that such writ should be delivered to the proper officer to be executed.<sup>8</sup> And the law is the same in this State.<sup>9</sup>

*The delivery* to the sheriff may be effected by leaving the writ at his office or the house where he usually transacts his business.<sup>10</sup> In order to fix the time of delivery, both against vendees or assignees of defendant, and against other executions, the sheriff or coroner is

<sup>1</sup> Britton v. Bean, D. C. Phil., 4 Phil. R. 289.

<sup>2</sup> Dent v. Ross, 11 Casey 337.

<sup>3</sup> Erie Canal Co. v. Loury, C. P. Erie, 6 Am. Law Reg. 750.

<sup>4</sup> Hensell v. Warden, C. P. Phila., 17 Leg. Int. 332.

<sup>5</sup> Gravenstine's Appeal, 13 Wright 310.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> See Tidd Pr. 1000.

VOL. I.—54

<sup>9</sup> Lewis v. Smith, 2 S. & R. 157; Act 16th June 1836, § 39, Purd. Dig. 437, pl. 40, Pamph. L. 768. This is taken from Act 21st March 1772, § 4, 1 Sm. Laws 390. In England a sale of the goods by defendant in *market overt*, even after the delivery of the writ, divests them of the lien; it is otherwise here where the law of *market overt* does not obtain. Easton v. Worthington, 5 S. & R. 130.

<sup>10</sup> Miffin v. Will, 2 Yeates 177.

required to endorse upon every writ of execution the day of the month and year and the hour of the day on which it was received, for which he is not allowed a fee.<sup>1</sup>

After the delivery of the writ, if the defendant make an assignment of his goods, the sheriff may take them in execution.<sup>2</sup> So he may levy on goods which had been without authority delivered by an agent of defendant to a creditor of defendant, in payment of his debt.<sup>3</sup> And a sale, after delivery of the writ, to an innocent third party by one who had previously purchased of the defendant in fraud of creditors, will not protect the goods from seizure under the writ.<sup>4</sup> But though the *fi. fa.* binds all the defendant's personal property in the bailiwick from the time it is put in the sheriff's hands, yet the object of this provision is to enable the creditor to frustrate fraudulent transfers by the debtor, and not to secure to the creditor a continuing lien.<sup>5</sup> Hence if the writ lie dormant for a considerable time in the hands of the sheriff without levy, a *bond fide* sale will be valid.<sup>6</sup> And where the sheriff made no levy under a writ which had been delivered to him, a subsequent levy and sale by a constable under another writ was held to pass the property to the purchaser.<sup>7</sup> Where there was no levy, the lien expires on the return day.<sup>8</sup>

So far as relates to the party himself, and to all others but purchasers for a valuable consideration, writs of execution bind the party's goods from the time of their *teste*.<sup>9</sup> But trustees in a voluntary assignment, made by a debtor for the benefit of creditors, may be considered as purchasers claiming under a deed made to secure the honest antecedent debts of fair creditors, and in such case execution will not bind the goods from the date of the *teste*.<sup>10</sup>

Where the United States marshal has levied on the defendant's goods to an amount more than sufficient to pay the executions in his hands, an execution delivered to the sheriff will bind the surplus in the hands of the marshal.<sup>11</sup>

An execution issued by a justice of the peace does not bind the goods of defendant until actual levy.<sup>12</sup>

As to real estate, the question whether an execution is a lien independent of the judgment on which it is founded, has been somewhat unsettled; it is now held that if the judgment is a lien, the execution thereon is not an independent lien, but if the judgment was no lien, the execution becomes a lien from the date of the levy.<sup>13</sup>

At common law the lien of a *testatum fi. fa.* on lands began from

<sup>1</sup> Act 16th June 1836, § 40, *Purd.* 33, 145; 2 *Show.* 485; 1 *Arch. Pr.* Dig. 437, pl. 41; *Pamph L.* 768.

<sup>2</sup> *Tidd Pr.* 1000; 16 *Johns.* 287.

<sup>3</sup> 18 *Johns.* 363.

<sup>4</sup> *McCabe v. Snyder*, D. C., 3 *Phila. Rep.* 192.

<sup>5</sup> *Earl's Appeal*, 1 *Harris* 482.

<sup>6</sup> 9 *Johns.* 133.

<sup>7</sup> *Duncan v. McCumber*, 2 *W. & S.* 264. See s. c., 10 *Watts* 215.

<sup>8</sup> *Commonwealth v. Magee*, 8 *Barr* 248.

<sup>9</sup> 2 *Saund.* 219 f; 2 *Vent.* 218; *Comb.*

<sup>10</sup> *Lippincott v. Barker*, 2 *Binn.* 187.

<sup>11</sup> *Bayard v. Bayard*, 5 *P. L. J.* 160.

See *Mon. Nav. Co. v. Lodlie*, 3 *P. L. J.* 179. See, however, *Hogan v. Lucas*, 10 *Peters S. C.* 400.

<sup>12</sup> Act 28th March 1820, § 4, 7 *Sm. Laws* 309.

<sup>13</sup> *Riland v. Eckert*, 11 *Harris* 215. See *Lea v. Hopkins*, 7 *Barr* 492; *Hastings's Case*, 10 *Watts* 303.

the delivery of the writ to the sheriff.<sup>1</sup> The lien of a *testatum fi. fa.* under the Act of 1836 continues on the defendant's land for five years from the time it is docketed, as provided by the act.<sup>2</sup>

The lien of a writ of restitution has been already explained.<sup>3</sup> The liens of other specific writs will be treated under their appropriate heads.

#### 6. *By whom execution is to be sued out.*

Execution ought to be sued out by one who is party or privy to the record.<sup>4</sup> In the English Common Pleas it may be sued out by a different attorney from the attorney in the cause, without obtaining an order for changing the attorney.<sup>5</sup> In Armstrong county an execution issued without the agency of an attorney at law is void.<sup>6</sup>

The assignee of a judgment may have execution thereon.<sup>7</sup> So it seems may one who has purchased the judgment without actual assignment.<sup>8</sup> If the assignor die, and no letters of administration are taken out within three months, the assignee may have execution in his own name; if he die after suit brought, the suit may be prosecuted as if he were living.<sup>9</sup>

After a conveyance by the plaintiff in ejectment to a third person, a *scire facias* and *habere facias* must issue in the name of the plaintiff in the original judgment.<sup>10</sup>

Where the plaintiff is dead, before issuing execution in the name of the executor it is proper to suggest the death of the plaintiff and substitute the executor upon the record: but where execution was issued in the name of the executor, without such substitution, and the money made, the court below having set aside the execution on that ground, the Supreme Court on writ of error remitted the record, with direction to suggest the death, and substitute the executor *nunc pro tunc*, and to reinstate the execution.<sup>11</sup> And after death of the plaintiff the judgment may be transferred by the administrator to another county for the purpose of issuing execution, and the suggestion of the death may be made either in the county to which the transfer is made, or in the other county before the transfer.<sup>12</sup> If there be no administrator the transfer may be made by a creditor to secure assets, or it seems by an heir.<sup>13</sup> Under the Act 24th February 1834, § 31,<sup>14</sup> an administrator *de bonis non* is entitled to issue execution on a judgment taken by his predecessor for purchase-money of decedent's land sold under order of court by the former administrator.<sup>15</sup>

An execution issued in the name of a plaintiff who is dead, without a *scire facias* to substitute his representatives, is not absolutely

<sup>1</sup> Cowden v. Brady, 8 S. & R. 505.

<sup>2</sup> See post, Sect. VI. "Testatum fi. fa."

<sup>3</sup> Ante, 706-8.

<sup>4</sup> Com. Dig. "Execution" (E.).

<sup>5</sup> 2 Bos. & Pul. 357.

<sup>6</sup> Act 16th April 1866, § 1, Purd. Dig. 1417, pl. 1, Pamph. L. 931.

<sup>7</sup> See Dunlop v. Speer, 3 Binn. 169.

<sup>8</sup> Gratz v. Bank, 5 Watts 101.

<sup>9</sup> Act 23d April 1829, § 1, Purd. Dig. 399, pl. 1, 10 Sm. Laws 455.

<sup>10</sup> Penn v. Klyne, P. C. C. R. 446.

<sup>11</sup> Darlington v. Speakman, 9 W. & S. 182.

<sup>12</sup> Act 6th April 1845, § 1, Purd. Dig. 574, pl. 19, Pamph. L. 540.

<sup>13</sup> Walt's Adm'rs. v. Swineheart, 8 Barr 97.

<sup>14</sup> Purd. Dig. 287, pl. 95, Pamph. L. 78.

<sup>15</sup> Meiser v. Eckhardt, 7 Harris 201.

void, and the party may justify under it.<sup>1</sup> And where one of the plaintiffs dies after judgment, the survivor may have execution without a *scire facias*, but if the survivor is a *feme*, who afterwards takes a husband, a *scire facias* is necessary.<sup>2</sup> In ejectment, where the lessor of the plaintiff dies after judgment, the execution may issue in the name of the lessee without a *scire facias*.<sup>3</sup>

If after the plaintiff's death, a mere stranger interposes and without a *scire facias* issues execution, the case is otherwise: but even then the party aggrieved ought to have the execution first set aside by a direct proceeding, after which he may have restitution, or recover damages in trespass; but he cannot question it collaterally while the judgment and execution are in full force.<sup>4</sup>

The necessity of a substitution where the parties have been changed since the judgment, has been already discussed;<sup>5</sup> the modes of effecting such substitution will be explained hereafter.<sup>6</sup>

#### 7. *Against whom execution may issue.*

So execution ought to be sued out against him who is party or privy:<sup>7</sup> it should follow the judgment and be warranted by it:<sup>8</sup> it should be against all the defendants;<sup>9</sup> and where judgment is entered against only one of two defendants, a joint execution is erroneous.<sup>10</sup>

If one of the defendants dies execution can be sued out against the survivors only, the goods of him who is dead being discharged.<sup>11</sup> So if judgment be against husband and wife and the husband die, execution may issue against the wife.<sup>12</sup> At common law, if execution were *tested* in the lifetime of a sole defendant, it might be executed against his personal representatives without a *scire facias*.<sup>13</sup> But execution *taken out* after defendant's death, against his executor or administrator, without a *scire facias*, is void.<sup>14</sup> Under our act, execution cannot issue against defendant who has died since the judgment (and it makes no difference that the execution is *tested* in the lifetime of defendant), unless his personal representatives be first warned by *scire facias*.<sup>15</sup>

A sale of real estate under an execution sued out after the death of the defendant, upon a judgment obtained against him in his lifetime and which was a lien at the time of his death, though voidable is not void.<sup>16</sup> But this has since been held otherwise.<sup>17</sup> But the court quashed such proceedings where the lien of the judgment was gone.<sup>18</sup> Where a defendant dies the judgment remains a lien upon the land of such deceased party, which may be rendered effective

<sup>1</sup> Day v. Sharp, 4 Whart. 339.

<sup>2</sup> Berryhill v. Mills, 5 Binn. 56.

<sup>3</sup> Penn v. Klyne, P. C. C. R. 446.

<sup>4</sup> Day v. Sharp, 4 Whart. 339, citing 3 Wils. 376; and see Darlington v. Speakman, 9 W. & S. 182.

<sup>5</sup> See ante, 779.

<sup>6</sup> See Vol. II., "Scire Facias on Change of Parties."

<sup>7</sup> Com. Dig. "Execution," (F.)

<sup>8</sup> 2 Saund. 72, h. k.

<sup>9</sup> 5 Bac. Abr. 165; 6 T. R. 525.

<sup>10</sup> McPeake v. Hutchinson, 5 Ser-

geant & Rawle 295.

<sup>11</sup> Commonwealth v. Miller's Administrators, 8 S. & R. 457.

<sup>12</sup> Com. Dig. "Execution," (F.)

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Act 24th February 1834, § 33, *Purd. Dig.* 288, pl. 99, *Pamph. L.* 79.

<sup>16</sup> Speer v. Sample, 4 Watts 367. See Springer v. Brown, 9 Barr 306.

<sup>17</sup> Cadmus v. Jackson, S. Ct., 23 Leg. Int. 196.

<sup>18</sup> Wilson v. Hurst, 1 P. C. C. R. 140.

by a *scire facias* against his representatives: if some of the defendants survive they may be joined in the *scire facias*.<sup>1</sup>

The substitution of the personal representatives of a deceased defendant has been already mentioned;<sup>2</sup> the proceedings in *scire facias* will be explained hereafter.<sup>3</sup>

Under a joint judgment the *fi. fa.* should be joint, as the execution must follow the nature of the judgment;<sup>4</sup> but this rule is technical, and has more of form than of substance in it, and the court out of which the process issues will take care that it be not so used as to work injustice, and will protect a surety from an attempted disregard of a release to him by a creditor.<sup>5</sup>

But a creditor who has judgment against the principal, against the endorsers, and against the absolute bail of the principal, and has issued execution and levied on the land of the principal, or of the absolute bail, may nevertheless have execution of the chattels of the endorsers: nothing but actual satisfaction can prevent him.<sup>6</sup>

A plaintiff who holds several judgments against a debtor with different sureties or endorsers, may, in the absence of any agreement to the contrary, issue execution upon any one of them, and the proceeds of personal property realized upon such execution will be applied to the debt upon which it issued.<sup>7</sup>

An equitable plaintiff or person for whose use or benefit, and at whose instance, the suit is prosecuted, whether named on the record or not, is liable to execution on a judgment against the legal plaintiff: *Provided*, That where such equitable plaintiff was not named on the record previous to judgment, his name shall be suggested on the record, supported by affidavit of his interest in the cause, before execution shall issue.<sup>8</sup>

A judgment for defendant for costs warrants an execution against the legal as well as the equitable plaintiff: but where the legal plaintiff had no notice of the use of his name, or where from other circumstances the costs ought to be paid by the equitable plaintiff, the court may upon application direct the *fi. fa.* so to issue.<sup>9</sup> The act is not to be so construed as to relieve the party who commenced the suit from his liability for costs, when his interest was subsequently assigned: it does no more than extend the remedy for non-payment of costs to an equitable plaintiff, whether marked on the record or not.<sup>10</sup>

8. *Of the officer who executes the writ, his duties and liabilities, and his compensation.*

*Who is to execute it.*—The proper officer to execute the writ of execution is the sheriff of the county in which the writ issues. If the sheriff is himself a party he cannot execute the writ;<sup>11</sup> and in

<sup>1</sup> Commonwealth v. Miller's Administrators, 8 S. & R. 457.

<sup>2</sup> See ante, 780.

<sup>3</sup> See Vol. II., "Scire Facias on Change of Parties."

<sup>4</sup> Shaffer v. Watkins, 7 W. & S. 219; Gibbs v. Atkinson, 3 P. L. J. 139.

<sup>5</sup> Mortland v. Himes, 8 Barr 265.

<sup>6</sup> Gro v. Huntingdon Bank, 1 Pa.

Reports 425.

<sup>7</sup> Marshall v. Franklin Bank, 1 Casey 384.

<sup>8</sup> Act 23d April 1829, § 2, Purd. Dig. 399, pl. 2; 10 Sm. Laws 455.

<sup>9</sup> Gifford v. Gifford, 3 Casey 202.

<sup>10</sup> Kinly v. Donnelly, C. P. Phila., 23 Leg. Int. 101.

<sup>11</sup> Com. Dig. "Viscount," E. l.

actions against the sheriff's sureties for damages on account of his official acts, or in any other actions wherein any one of them happens to be defendant, the process ought not to be intrusted to the sheriff:<sup>1</sup> and so if there is any just cause of objection to him from his situation with regard to the defendant. In such cases, as well as when the office of sheriff is vacant, the writ may, upon suggestion to the prothonotary, be directed to the coroner, who in such case has the powers and is subjected to the liabilities of the sheriff.<sup>2</sup> Although no just cause exist for passing by the sheriff, the writ is not void, and the coroner at his peril must execute all process directed to him by a court having jurisdiction; it is not for him to object that the direction is erroneous.<sup>3</sup>

If there is no coroner in commission, any constable of the county may serve the process.<sup>4</sup>

The constable is the ministerial officer of aldermen's and justices' courts: and the marshal of the U. S. courts, their power and duties being similar to those of the sheriff: where the marshal or his deputy is a party the writ may be directed to and executed by such disinterested person as the court or any judge thereof may appoint, and in case of the death of the marshal, his deputy shall continue in office unless specially removed, and execute writs in the name of the deceased marshal, until a successor is appointed.<sup>5</sup>

If the sheriff's term expires after the writ is placed in his hands and before it is executed, he must turn it over to his successor.<sup>6</sup> This need not be done in writing: the duties of the old sheriff cease by mere tradition of the writs.<sup>7</sup> But after a levy under a *fi. fa.* the sheriff must go on to sell the goods notwithstanding the expiration of his term of office.<sup>8</sup> And in case of real estate it seems that if the sheriff goes out of office after executing a deed, he may acknowledge it.<sup>9</sup>

Where the sheriff dies after depositing in bank to his account as sheriff, the money made on an execution, his successor in office is the proper party to demand and receive the money from the bank; and the proper course is to rule him to pay it into court or to the plaintiff: outside parties who are not, by legal process, official position or otherwise, in court and subject to its jurisdiction, are to be acted upon only by the ordinary process of law: the bank in this case was such an outside party; and a rule upon it to pay the money into court was null and void for want of jurisdiction, and might be restrained by injunction, or reversed upon appeal, or disregarded as incapable of execution.<sup>10</sup> And it would seem that an

<sup>1</sup> Dalt. on Sheriffs 104; Beale's Executors v. Commonwealth, 11 S. & R. 302.

<sup>2</sup> 1 Bl. Com. 349; Act 15th April 1834, § 75, Purd. Dig. 896, pl. 18, Pamph. L. 551.

<sup>3</sup> Beale's Executors v. Commonwealth, 11 S. & R. 302.

<sup>4</sup> Act 22d April 1850, § 19, Purd. Dig. 897, pl. 27, Pamph. L. 553. *Sed quare*, whether this extends to executions.

<sup>5</sup> Act Cong. 24th Sept. 1789, § 29 Bright. Dig. 596, pl. 2, 1 Stat. 87.

<sup>6</sup> Leshey v. Gardner, 3 W. & S. 318.

<sup>7</sup> Ibid.

<sup>8</sup> Spang v. Commonwealth, 2 Jones 360, per BELL, J.: 1 Salk. 323.

<sup>9</sup> Woods v. Lane, 2 S. & R. 55; Stanley et al. v. —, D. C. Phila., Nov. 1826, MS.

<sup>10</sup> Allegheny Bank's Appeal, 12 Wright 328.

\* officer whose official term has expired is equally beyond the summary jurisdiction of the court.<sup>1</sup> But an exception to this principle is created by the 28th section of the Act of 16th June 1836, which gives to the courts power to make rules on sheriffs and coroners, for the return of all process in their hands, and for the payment of money, or delivery of any article of value in their possession, according to their respective duties, and extends this power to include former sheriffs and coroners, if application be made for the purpose within two years after the termination of their offices respectively.<sup>2</sup>

*Distringas*.—Where a sheriff goes out of office, after returning that he has levied, but that the goods remain on his hands for want of buyers, instead of suing out a *venditioni exponas*, the plaintiff may sue out a *distringas nuper vice comitem*, directed to the present sheriff, commanding him to distrain the late sheriff to sell the goods.<sup>3</sup> The former sheriff must thereupon sell the goods, and pay over the money, otherwise he will forfeit issues to the amount of the debt.<sup>4</sup> On an *alias distringas* against the former sheriff, for not selling goods on a *venditioni exponas*, the court ordered the issues to be increased to the amount of the debt, and costs subsequently incurred.<sup>5</sup>

A *distringas*, directed to the coroner, will lie against a sheriff while in office to compel a sale of goods levied on; but where the goods levied on had been taken out of the hands of the sheriff, by virtue of a replevin, the court, in consideration of the circumstances, quashed the *distringas*.<sup>6</sup>

The court out of which any writ of *distringas vice comitem*, or *distringas nuper vice comitem*, or other writ of *distringas* proceeds, may, by a rule for that purpose made, order and direct that the issues levied from time to time shall be sold, and the proceeds applied in the first instance to pay plaintiff's costs, to be allowed by the court at their discretion, and the remainder of the proceeds to be paid into court, to be retained until the defendant appears, or the other purpose of the writ is answered, or to be rendered to the plaintiff for his debt, damages, and costs where ascertained: *Provided*, That where the purpose of the writ is answered the issues shall be returned, or if sold, what remains of the proceeds shall be returned to the party distrained upon.<sup>7</sup>

The authority of the sheriff is, as a general rule, confined to his own county, and he cannot go beyond its boundaries for the purpose of executing a writ of execution. An exception to this rule is allowed *ex necessitate* in the case of execution against a tract of land which lies in more than one county, as will be hereafter explained.<sup>8</sup> And in case of an escape, he may, on fresh pursuit, retake the prisoner in another county.<sup>9</sup>

<sup>1</sup> See *Aurentz v. Porter*, 12 Wright 835.

<sup>2</sup> *Purd. Dig.* 189, pl. 6, Pamph. L. 793.

<sup>3</sup> *Tidd Pr.* 1021; 1 *Arch. Pr.* 271; 2 *Saund.* 47 l.

<sup>4</sup> 6 *Mod.* 295.

<sup>5</sup> 4 *Barn. & Ad.* 652.

<sup>6</sup> *Zane's Executors v. Cowperthwaite*, 1 *Dallas* 312.

<sup>7</sup> Act 28th March 1803, § 8, *Purd. Dig.* 896, pl. 17, 4 *Sm. Laws* 49.

<sup>8</sup> *Vide post*, Sect. VI.

<sup>9</sup> *Avery v. Seely*, 3 *W. & S.* 497.

This limitation of the sheriff's authority to his own bailiwick is in some cases the occasion of great inconveniences, which may, however, generally be overcome by means of *testatum* writs of execution, hereafter to be explained.<sup>1</sup> But under a *testatum capias* he cannot carry the defendant out of his bailiwick to the county whence the writ issued.<sup>2</sup> The authority of the officer within his bailiwick is limited as to writs of execution. He may enter the house of the defendant when the outer door is open, in order to take the goods of the defendant; but he cannot break open the door of a dwelling-house; it is even said that he cannot open a latch.<sup>3</sup> But the privilege of a man's house extends only to the owner, and will not protect the house of a third person in which the goods of the defendant are; and in such case if the owner of the house refuse to deliver the defendant's goods upon request of the sheriff, he may break open the house; and the privilege only applies to dwelling-houses, so that a barn or storehouse of the defendant may be broken open.<sup>4</sup> When the officer is once inside the house he may break open inner doors or trunks in order to come at the goods, and this even without previously demanding entrance.<sup>5</sup> A levy, like a distress, may be made through an open window.<sup>6</sup>

Under a *fi. fa.* against the goods of an intestate, the officer may enter the house of the administrator in order to search for such goods;<sup>7</sup> but should he then proceed to levy on the goods of the administrator, from whom nothing was due, this would render him a trespasser *ab initio*.<sup>8</sup>

The extent of the sheriff's authority, under writs of execution, will be considered more in detail when we come to treat of the different writs separately.

A return that the property was struck down to A. for B. creates no liability on which the sheriff can maintain an action for the purchase-money against B., and the refusal of the court to strike off the return, is, at most, no more than an affirmance of the legal liability of A.<sup>9</sup>

If the sheriff sells stock on execution he is not bound to transfer it on the books of the company; the record is sufficient evidence of the title of his vendee.<sup>10</sup>

A sheriff who has legally levied on property bound by a lien has a right to discharge it in order to get possession; for his writ gives him every implied power which may be necessary to the execution of it.<sup>11</sup>

A sheriff's officer has no right, when executing a writ of *habere facias possessionem*, to qualify the legal effect of his act by any declaration he may make to the parties.<sup>12</sup>

<sup>1</sup> *Vide post*, Sect. VI.

<sup>2</sup> *Avery v. Seely*, 3 W. & S. 497.

<sup>3</sup> *Tidd Pr.* 1012; *Curtis v. Hubbard*,

4 *Hill* 437; s. c. 1 *Ibid.* 336; *Boggs v. Vandyke*, 3 *Harring.* 288.

<sup>4</sup> *Tidd Pr.* 1012.

<sup>5</sup> *Ibid.*

<sup>6</sup> 1 *Roll. Atr.* 671.

<sup>7</sup> *Tidd Pr.* 1011.

<sup>8</sup> *Hazard v. Israel*, 1 *Binn.* 240.

<sup>9</sup> *Lelar v. Holmes*, 6 *Harris* 281.

<sup>10</sup> *Sewall v. The Lancaster Bank*, 17 *S. & R.* 285.

<sup>11</sup> *McMichael v. Mason*, 1 *Harris* 215.

<sup>12</sup> *Wengert v. Zimmerman*, 9 *Casey* 508.



Though the sheriff be imprisoned he may still act by deputy.<sup>1</sup>  
He is the agent of the law, not of the plaintiff.<sup>2</sup>

*Liabilities.*—The sheriff is liable for neglect and misconduct in the execution of the writ to the party injured thereby, whether plaintiff, defendant, or a stranger to the suit. And in this State he is answerable, for all civil purposes, for the conduct of his deputy, whether he recognises and adopts his acts or not.<sup>3</sup> And in an action against the sheriff for the misconduct of his officer in the execution of a writ, it is not necessary to show a particular warrant to the officer; proof of general privity is sufficient; and exemplary damages may be given against the sheriff for the misconduct of his deputy.<sup>4</sup> So he is answerable for the conduct of his deputy in taking the goods of a stranger, although the deputation was a special one, to execute the *fi. fa.* at the risk of the plaintiff in the writ.<sup>5</sup>

The Act of 15th April 1834 provides that every sheriff, before he can be commissioned, or execute any of the duties of his office, must enter into a recognisance, and become bound in a bond with at least two sufficient sureties,<sup>6</sup> in amounts fixed by the act different for the different counties.<sup>7</sup> The condition, which is the same in both recognisance and bond, is in these words: "That if the said A. B. shall and do without delay, according to law, well and truly serve and execute all writs and process of the said commonwealth to him directed, and shall and do from time to time, upon request to him for that purpose made, well and truly pay, or cause to be paid to the several suitors and parties interested in the execution of such writs or process, their lawful attorneys, factors, agents, or assigns, all and every sum and sums of money to them respectively belonging, which shall come to his hands; and shall and do from time to time, and at all times during his continuance in the said office, well and faithfully execute and perform all and every of the trusts and duties to the said office appertaining; then this obligation to be void, &c."<sup>8</sup>

The coroner, before entering upon the duties of his office, must enter into bond and recognisance in one-fourth the amount required from the sheriff of the same county,<sup>7</sup> conditioned that he will "well and truly perform all and singular the duties to the said office of coroner appertaining."<sup>9</sup>

It appears to have been the intention of the legislature to give the community security for redress against the sheriff in all cases of injury received by his official misconduct.<sup>10</sup> The recognisance binds the estate of the obligors as effectually as a judgment.<sup>11</sup> Its

<sup>1</sup> Commonwealth v. Shaver, 3 W. & 28th March 1803, 4 Sm. Laws 45. S. 344.

<sup>2</sup> Lytle v. Mehaffy, 8 Watts 269.

<sup>3</sup> Hazard v. Israel, 1 Binn. 240.

<sup>4</sup> Ibid. See Overholzer v. McMichael, 10 Barr 139.

<sup>5</sup> Wilbur v. Strickland, 1 Rawle 458.

<sup>6</sup> Sect. 62, Purd. Dig. 893, pl. 1, Pamph. L. 547. This and the following provisions are taken from the Act

<sup>7</sup> Sect. 63, Ibid. pl. 2.

<sup>8</sup> Sect. 64, 65, Purd. Dig. 894, pl. 3, 4.

<sup>9</sup> Sect. 66, Ibid., pl. 5.

<sup>10</sup> Sect. 67, Purd. Dig. 895, pl. 6.

<sup>11</sup> Camack v. Commonwealth, 5 Binn. 184.

<sup>12</sup> Act 15th April 1834, § 74, Purd. Dig. 895, pl. 13, Pamph. L. 552.

lien was formerly unlimited both in duration and extent;<sup>1</sup> but it now, except in Philadelphia, expires after ten years from the date of the recognisance.<sup>2</sup> The mode of proceeding against the sheriff and his sureties, upon their official bond and recognisance, will be explained hereafter.<sup>3</sup>

*Liability to plaintiff.*—He is liable to the plaintiff for not executing a *fi. fa.*, though the plaintiff has taken a collateral having time to run.<sup>4</sup> But not if the writ has been stayed by order of a judge; and it is no part of his duty to notify the plaintiff of the receipt of such order.<sup>5</sup> If the sheriff refuse to levy on defendant's goods, an action may be supported against him on his official bond before the return of the writ.<sup>6</sup> Or if after such refusal to levy he return "*nulla bona*," he is liable in an action for false return for nominal damages at least, and beyond that for all damages actually suffered by the plaintiff in the execution by reason of his refusal; the measure of damages is however not the amount of the execution; for there may have been other previous executions in the sheriff's hands which would have taken all the proceeds, even if the levy had been made according to the instructions.<sup>7</sup> And if the delay is occasioned by the default or interference of the plaintiff, and the injury is not solely chargeable on the sheriff, the damages may be nominal.<sup>8</sup> But if the plaintiff has not been actually aggrieved, he is not entitled to even nominal damages.<sup>9</sup> So where a writ was irregular, as where a justice issued an execution on a judgment of another justice who was temporarily absent, the constable is not bound to execute it, and is not liable in damages for a refusal to do so.<sup>10</sup>

Where the execution was postponed because the goods levied on were not in the power or view of the sheriff, but were several miles distant, the sheriff is liable to the execution-creditor for the amount realized by the preferred execution which was properly levied.<sup>11</sup>

The issue of an *alias* does not release the sheriff from liability incurred at the return of the former execution; nor does the subsequent granting of a rule to show cause why the judgment should not be opened.<sup>12</sup>

*Indemnity.*—Where the property of the defendant in the goods is disputed, the sheriff has at common law a right to indemnity from the plaintiff before seizing such goods on a *fi. fa.*; and a refusal to indemnify in a case where it might reasonably be demanded

<sup>1</sup> Snyder v. Commonwealth, 3 Pa. R. 286.

<sup>2</sup> Act 3d April 1860, § 1, Purd. Dig. 895, pl. 15, Pamph. L. 650.

<sup>3</sup> See Vol. II., "Scire Facias on Sheriff's Recognisance and Official Bonds."

<sup>4</sup> Bank v. Potius, 10 Watts 148.

<sup>5</sup> Commonwealth v. Magee, 8 Barr 240. So as to *ca. sa.*: Frick v. Kit-chen, 4 W. & S. 30.

<sup>6</sup> Shannon v. Commonwealth, 8 S. & R. 450.

<sup>7</sup> Forsyth v. Dixon, S. C., 2 Am. Law Reg. 122; s. c., 1 Grant 26.

<sup>8</sup> Dorrance v. Commonwealth, 1 Harris 160.

<sup>9</sup> Commonwealth v. Contner, 9 Harris 266.

<sup>10</sup> Eberle v. Medara, S. C., 2 Phila. Rep. 284.

<sup>11</sup> Linton v. Commonwealth, 10 Wright 294.

<sup>12</sup> Myers v. Commonwealth, 2 W. & S. 60. See Evans v. Boggis, 2 Ibid. 229.

by the sheriff would be a justification in an action for a false return.<sup>1</sup> And this right to indemnity applies to seizures under a foreign attachment or attachment-execution.<sup>2</sup> But not to levy on real estate.<sup>3</sup>

The proper practice where indemnity is necessary, is, for the sheriff to take a rule to stay proceedings until indemnity is given.<sup>4</sup>

<sup>1</sup> See 1 Dane's Abr. 125, c. 1, a. 42, § 5, 6; Spangler v. Commonwealth, 16 S. & R. 68; Corson v. Hunt, 2 Harris 510.

<sup>2</sup> Shriver v. Harbaugh, 1 Wright 401.

<sup>3</sup> Meyer, to use, &c., v. Riot. D. C. Phila., March 6th 1848. Motion by sheriff for rule to stay proceedings until indemnity. *Per curiam*. This is a *vend. exp.* levied upon real estate; and an adverse claimant, and, it is said, possessor of the premises levied on, has given the sheriff notice that he will hold him responsible for damages in levying upon, advertising, and selling his property. The sheriff, however, does not take possession of real estate as he does of goods and chattels, and deliver possession to the purchaser; all he does is, to sell the right, title, and interest of defendant. The practice of indemnifying the sheriff has never been extended to such a case, and we will not make the first precedent. Motion refused.

<sup>4</sup> Watson on Sheriffs 137, 141; Spangler v. Commonwealth, 16 S. & R. 71, per DUNCAN, J.; Nagle v. Stroh, 4 Watts 125; Keffer v. Britt, D. C. Phila., February 19th 1848. Why the time for returning the writ should not be enlarged. *Per curiam*. In this case on the hearing, the rule was opposed on the ground of *laches* in the sheriff. The writ was returnable to the first Monday of November. The notice of an adverse claim was made to the sheriff, October 27th 1847. A rule by the plaintiff on the sheriff to return his writ was taken January 27th, and this rule by the sheriff on the following day, January 28th. This would present a case of *laches* on the part of the sheriff upon which the court would refuse to interfere for his relief by enlarging the time for his return. It is the duty of the sheriff where an adverse claim is made to personal property, promptly to give notice to the plaintiff's attorney of the fact. Since the hearing, the sheriff has banded to the court the affidavit of Samuel Halsell to prove the fact of immediate notice. As that is an *ex parte* affidavit, we cannot act upon it. We will enlarge this rule

until Saturday next, for depositions on this point.

As to the objection that the goods levied on were claimed under a bill of sale unaccompanied by possession, which is a fraud in law, we are in possession of no facts. It is enough that there is a claim presented to the sheriff, supported by affidavit, "of that kind which would reasonably raise a doubt or apprehension as to the title, or create a pause in the mind of a constant man." Spangler v. The Commonwealth, 16 S. & R. 71. And the plaintiff must make out a very strong case to justify him in requiring the sheriff to go on without an indemnity.

Rule enlarged until Saturday, Feb. 26th.

Adams v. Hazlitt. D. C. Phila. Saturday, Feb. 26th 1848. Why the time for return of the writ of *f. fa.* should not be enlarged.

*Per curiam*. In this case, the writ issued January 18th. The adverse claim was made January 21st. A bond of indemnity was given and accepted by the sheriff on January 31st; and the goods levied on were advertised to be sold on the 9th February. The surety in the bond of indemnity before that time made a general assignment for the benefit of his creditors, and it is not pretended here that the indemnity is sufficient; but it is contended by the plaintiff that the sheriff having once accepted the indemnity as good, it is too late for him afterwards to refuse to proceed. He took the risk when he accepted the indemnity. We admit that this is too harsh a doctrine to apply to the case of the sheriff. He is obliged to incur great responsibilities at best, and we think when he discovers that insufficient sureties have been imposed upon him, he may at any time before the sale of the goods decline proceeding further, until the indemnity has been made good.

Another ground of objection to the making this rule absolute, is, that it is said parts of the goods levied on are claimed adversely. As long, however, as the plaintiff refuses to release the goods claimed from the operation of the

An inquest of office to ascertain the title cannot be held here as in England: <sup>1</sup> nor will the court try the property in goods levied on, as it would deprive the party of his right to a jury trial. <sup>2</sup> Where the property was in dispute and the plaintiff agreed to furnish indemnity at any time before the sale, the sheriff must demand it before refusing to proceed, or the want of it will not excuse him if the goods turn out to be the property of defendant. <sup>3</sup> If indemnity is demanded and refused, the sheriff may either return "*nulla bona*" or refuse to sell anything but the interest of the defendant. <sup>4</sup> There is no implied promise of indemnity where the goods of a stranger have been levied on through accident or mistake, but not under the special instructions of the plaintiff. <sup>5</sup> An endorsement "levy at the risk of the plaintiff," is perhaps an agreement to indemnify the sheriff. <sup>6</sup> Where the sheriff has received or is tendered an indemnity, it is his duty to proceed under penalty of being attached or fixed for the debt. <sup>7</sup> If the sheriff has returned "levied," the ownership of the goods by a stranger is no defence in an action against him by the plaintiff for refusing to sell; and his return to a *venditioni exponas* that "the plaintiff had neglected to give indemnity according to his promise;" and to an *alias venditioni exponas*, that he "could not find the goods levied on," are inadmissible in evidence. <sup>8</sup> But the failure of the party claiming the goods to interplead, does not oblige the sheriff to sell whether they do or do not belong to the defendant, and he is not precluded by such failure from showing, in an action against him by the execution-plaintiff, that the goods belonged to such claimant. <sup>9</sup>

In an action of debt by a sheriff on a bond of indemnity, a defence that the sale was not made under the execution named in the bond, and that the recovery of damages against the sheriff was not by reason of anything done by virtue of said execution, was held insufficient: and a plea stating that before the receipt of the said

levy, the sheriff is entitled to have the indulgence here asked for. If he sold the part unclaimed and returned no more, the plaintiff would have his action against him.

We repeat what we have already had occasion to say in more than one case lately, that a claim supported by affidavit is *prima facie* sufficient ground for the sheriff to pause and demand indemnity. And that it must be a strong case of want of title in the claimant and inability in the plaintiff to give indemnity, that would justify the court in refusing to enlarge the time for making the sheriff's return. If the plaintiff is a resident here, and a man of substance or character, the more groundless the claim, the easier will it be to procure indemnity; and if there is any risk at all, there is no reason, when he is liable, why he should throw it on the shoulders of the sheriff.

Rule absolute.

<sup>1</sup> Spangler v. Commonwealth, 16 S. & R. 68.

<sup>2</sup> Young v. Taylor, 2 Binn. 228.

<sup>3</sup> Miller v. Commonwealth, 5 Barr 294.

<sup>4</sup> Patterson v. Anderson, 4 Wright 359.

<sup>5</sup> Fitler v. Fossard, 7 Barr 540.

<sup>6</sup> Keyser's Appeal, 1 Harris 411, per ROGERS, J.

<sup>7</sup> Watmough v. Francis, 7 Barr 217; Corson v. Hunt, 2 Harris 510; Welsh v. Bell, 8 Casey 12; Meeker v. Sutton, S. Ct., 2 Phila. Rep. 288. But see Commonwealth v. Watmough, 6 Whart. 117. For a fuller view of the practice in relation to indemnity see *post*, Sect. II., "Proceedings where the Goods are Claimed as the Property of a Stranger."

<sup>8</sup> Miller v. Commonwealth, 5 Barr 294.

<sup>9</sup> Commonwealth v. Megee, D. C. Phila., 4 Phila. Rep. 258.

execution the sheriff had another execution in his hands, under which the sale was made, was *held* defective in not stating that the sale was made *exclusively* under the other execution.<sup>1</sup>

In an action against the sheriff for refusing to proceed, the measure of damages is the value of the goods if this does not equal the amount of the debt.<sup>2</sup>

If the sheriff neglect to levy, and subsequently the writ is stayed by order of court, the sheriff nevertheless remains liable for his former negligence if the plaintiff was injured thereby.<sup>3</sup>

Where the officer was liable for neglect to execute the writ, the issuing of an *alias* execution does not release his liability for negligence.<sup>4</sup>

*Abandonment of levy.*—The sheriff is liable to the plaintiff if, after levying on defendant's goods, he illegally withdrew from and surrendered the possession and made return to that effect;<sup>5</sup> or if he suffer the goods levied on to be eloiigned.<sup>6</sup>

The measure of damages seems to be the amount endorsed on the execution, unless the property levied on was worth less, or there were other liens upon it prior to the plaintiff—in which case the plaintiff can recover only the fair value of the goods levied on above the amount of such liens.<sup>7</sup> The value of the goods is not the price at which they afterwards sold, nor that which the plaintiff would have been willing to give, but what they would have brought at a fair *bond fide* sale without puffing.<sup>8</sup>

*Refusal to sell.*—Where the sheriff has levied upon goods and refuses to sell, the plaintiff is entitled to recover the amount of the goods, or the amount of the execution, whichever is least: but each creditor can recover only what he has lost by the sheriff's misfeasance, and one who could have got nothing if the sheriff had done his duty, can demand nothing for the breach of it.<sup>9</sup> And a rule to show cause why the judgment should not be opened does not stay the proceedings without an order of the court to that effect; and the sheriff is liable for the value of goods previously levied on under such judgment, which, through his neglect to sell, were levied and sold under a subsequent execution, and the proceeds paid to the plaintiff in that execution.<sup>10</sup>

*Refusal to deliver.*—If the sheriff refuse to deliver the goods to the plaintiff who purchased at the sale, but delivered them instead to an alleged partner of the execution-defendant, he is liable to such purchaser for the value of the goods; and in an action against him by such purchaser, the record of an equity suit, instituted to test the title of the alleged partner and decided against him, is compe-

<sup>1</sup> *Watmough v. Francis*, 4 P. L. J. Wright 187.  
16; s. c., 7 Barr 206.

<sup>2</sup> *Corson v. Hunt*, 2 Harris 510.

<sup>3</sup> *Myers v. Commonwealth*, 2 W. & S. 63.

<sup>4</sup> *Myers v. Commonwealth*, 2 W. & S. 63; *Evans v. Boggs*, Ibid. 229.

<sup>5</sup> *Commonwealth v. Contner*, 6 Harris 439.

<sup>6</sup> *Mitchell v. Commonwealth*, 1 358.

<sup>7</sup> *Commonwealth v. Contner*, 6 Harris 439. See *Mitchell v. Commonwealth*, 1 Wright 187.

<sup>8</sup> *Commonwealth v. Contner*, 6 Harris 439.

<sup>9</sup> *Kamner v. Griffith's Administrator*, 1 Grant 193.

<sup>10</sup> *Spang v. Commonwealth*, 2 Jones

tent evidence against the sheriff, though he was not a party to the equity proceedings.<sup>1</sup>

*Not returning writ.*—He is liable in an action for not returning the writ if the plaintiff has suffered damage thereby: and his failure to return throws the *onus* upon him.<sup>2</sup> But mere omission to return the writ till after the return day, is not of itself such negligence as will make him liable in an action.<sup>3</sup> In an action on the sheriff's official bond, where the breach assigned was the failure to return the writ and a default in selling the goods levied on, the sheriff is answerable only for actual damages sustained by the plaintiff in consequence of the default alleged; and if he had actually sold the goods, though he had not returned the writ, the damages should be only nominal.<sup>4</sup>

*On return.*—The sheriff is liable in an action for a false return. And though he were misled either by the mistake or misrepresentation of his deputy it will not excuse him: in such case the sheriff alone is responsible to the injured party.<sup>5</sup> If he return that he has sold goods to a certain amount he is liable therefor.<sup>6</sup>

So by his return of a sale of land, or, what is equally efficacious, by making a deed, he fixes himself for the price bid.<sup>7</sup>

The effect of a return, as well upon the sheriff as the parties, will be more fully explained hereafter.<sup>8</sup>

*On receipt of money.*—Where he has collected the debt, interest, and costs, he is liable for the judgment-fee to the attorney—not to the plaintiff unless the latter has prepaid it.<sup>9</sup> So he is not liable to plaintiff for court costs unless the latter has advanced them.<sup>10</sup>

If he retains the money in his hands he is liable for interest, but only from the time of demand;<sup>11</sup> and a rule on him to pay the money into court cannot be regarded as equivalent to a demand, where there was a dispute about the right to the money and a long delay during which the dispute existed, though he does not account for the disposition of the money in the mean time.<sup>12</sup> But after a verdict against him for not paying over proceeds of an execution, it will be presumed that evidence of a legal demand was given, if a rule of court required one to be made.<sup>13</sup>

If he were prevented from paying over the money by a rule to show cause why the execution should not be quashed, he is not liable for interest; and this though the purchasers have not paid him, and may be liable to him for interest.<sup>14</sup>

*On distribution.*—If he pay the money to any of the claimants.

<sup>1</sup> *Patterson v. Anderson*, 4 Wright 359. per Rogers, J.

<sup>2</sup> *Commonwealth v. McCoy*, 8 Watts 154. In Wayne county the sheriff may refuse to return a *ca. sa.* in case of trespass until his costs are paid: Act 23d March 1865, § 2, *Purd. Dig.* 1412, pl. 2, *Pamph. L.* 585.

<sup>3</sup> *Commonwealth v. Magee*, 8 Barr 240.

<sup>4</sup> *Commonwealth v. Allen*, 6 Casey 49.

<sup>5</sup> *Mentz v. Hamman*, 5 Whart. 154,

<sup>6</sup> *Christy v. Bohlen*, 5 Barr 39.

<sup>7</sup> *Hinds v. Scott*, 1 Jones 27.

<sup>8</sup> See *post*, "Return of Writ."

<sup>9</sup> *Pontius v. Commonwealth*, 4 W. & S. 52.

<sup>10</sup> *Commonwealth v. McCoy*, 8 Watts 154.

<sup>11</sup> *Hantz v. York Bank*, 9 Harris 291.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Levistein v. Deal*, 3 Phila. Rep. 413.

<sup>14</sup> *Stewart v. Stocker*, 13 S. & R. 199.

he is liable in case of mistake to the parties injured.<sup>1</sup> If he obeys the command of his writ and pays it into court, he is free from all responsibility.<sup>2</sup> Where he took notes instead of cash for the price of the goods he has no right to assign them to a stranger in payment of his own private debt, and the parties interested may follow the fund and reclaim it in the hands of such an assignee with notice, and are not confined to their remedy against the sheriff's sureties: in such case notice of the consideration of the notes given to the attorney or agent of the assignee, is notice to the principal.<sup>3</sup>

He is not allowed to disaffirm the right of the plaintiff to the proceeds upon any allegation, such as that his letters of administration are void, or that being a trustee he has not given the necessary security: in such cases, however, the court will secure the creditors before the plaintiffs have leave to take the money out of court.<sup>4</sup>

His liability for neglect to pay arrears of ground-rent, due at the time of the sale, is not affected by giving notice at the sale that such arrears would be paid out of the purchase-money if the bills should be presented to the sheriff, otherwise they would be paid by the purchaser.<sup>5</sup>

*Liability to defendant.*—We have already discussed the liability of the sheriff to the defendant in regard to claims under the Exemption Law.<sup>6</sup>

He is liable as a trespasser if he abuses his authority in the execution of the writ.<sup>7</sup> He is to be guided by the amount endorsed on the writ.<sup>8</sup> But if he levies in pursuance of his instructions and without any abuse of his authority, he is liable only for the injury actually sustained: in such case the measure of damages is the value of the goods with interest from the time of taking them, or, if they are articles of merchandise, from the expiration of the usual term of credit on sales.<sup>9</sup>

So he is liable if he proceeds irregularly: thus, a constable who sells any portion of the goods without levy or advertisement, is liable therefor to the owner.<sup>10</sup> And, where notes for money belonging to the defendant were taken in execution, and sold by the sheriff to the plaintiff for less than their face, the sheriff was ordered to account for them at their full value.<sup>11</sup>

He is liable if the writ under which he proceeds is irregular. If the writ be regular he may justify under it, though the judgment be erroneous, for this is the act of the court; and in justifying he need only give the execution in evidence.<sup>12</sup> And he may justify under an irregular judgment as well as an erroneous one, and, so as the writ be not void, however erroneous, it is a good justification, and the purchaser will gain a title under the sheriff.<sup>13</sup>

Between erroneous and irregular process this distinction exists:

<sup>1</sup> McDonald v. Todd, 1 Am. Law Reg. 250.

<sup>2</sup> Ibid. GIBSON, J.

<sup>3</sup> Reed's Appeal, 10 Casey 207.

<sup>4</sup> Dean v. Patton, 1 Pa. R. 438.

<sup>5</sup> Mather v. Mitchell, 1 Harris 301.

<sup>6</sup> Ante, 817.

<sup>7</sup> Wilson v. Ellis, 4 Casey 238.

<sup>8</sup> Commonwealth v. McCoy, 8 Watts 154.

<sup>9</sup> Insurance Company v. Conrad, Bald. 138.

<sup>10</sup> Ward v. Taylor, 1 Barr 238.

<sup>11</sup> Fulton v. Irwin, Add. 19.

<sup>12</sup> 12 Johns. 305.

<sup>13</sup> 1 Vez. 195; 1 M. & S. 425.

the latter is void from the beginning: under the first a *party* may justify until it is reversed, but not under an irregular process, because it was his own fault that it was irregular at first;<sup>1</sup> and if the officer in such case join in the same plea with the party, he loses the benefit of his own defence.

But the officer may justify under a writ issued contrary to an agreement between the plaintiff and the defendant.<sup>2</sup>

*Liability to third persons.*—As has been seen, the sheriff is bound at his peril to take only the goods of the defendant, and is a trespasser if he take the goods of a third person, though the plaintiff assure him that they are the defendant's property.<sup>3</sup> He is answerable for the conduct of his deputy in taking such goods.<sup>4</sup> In case of doubt as to the ownership of the goods, he may protect himself before levying by demanding indemnity from the plaintiff, and after levying by taking out a rule, under the Sheriff's Interpleader Act, to compel the claimant to establish his claim before a jury.<sup>5</sup> In case he is indemnified by the plaintiff, though he remains liable for damages to the stranger whose goods are taken, he has an action over against the plaintiff; under the interpleader he incurs no responsibility whatever, but merely delays till the title is determined, and then proceeds or abandons his levy, in accordance with the decision.

We have already explained the leading doctrines in regard to the liability of goods, claimed by a third person, to execution.<sup>6</sup> It is not necessary that there should be an actual taking of the goods of a stranger to the writ; a levy upon them is an exercise of dominion over them sufficient to constitute a trespass.<sup>7</sup> And a return of "attached" to a foreign attachment is conclusive against the sheriff in trespass brought by a stranger to the writ.<sup>8</sup> Under an execution against one partner, the sheriff can only sell, and the purchaser acquire the *interest* of such partner in the effects of the firm; if he seize, sell, and deliver the goods themselves he commits a trespass, and is liable to the partner, who is not a defendant, for the injury committed in selling his property.<sup>9</sup>

If at the time a levy was made on goods, in possession of a vendee, under an execution against his vendor, it was known to the vendee that the goods were taken as the property of the vendor, and as a means of avoiding the sale, and the vendee gave only a general notice of his claim, such notice will amount only to a denial of fraud in the original sale, and the vendee will not afterwards be permitted to treat the sheriff as a trespasser, on proof of subsequent additions to the goods out of his own means: if, however, the vendee did not know on what ground the levy was made, nothing but a general notice would be necessary, and this would be suffi-

<sup>1</sup> 3 Johns. 523.

<sup>2</sup> Swires v. Brotherline, 5 Wright 135.

<sup>3</sup> 2 Bac. Abr. 715; 4 T. R. 633; Carmack v. Commonwealth, 5 Binn. 184.

<sup>4</sup> Wilbur v. Strickland, 1 Rawle 458.

<sup>5</sup> See *ante*, 858-61, and *post*, Sect. II., "Proceedings where goods levied on

are claimed by a stranger."

<sup>6</sup> See *ante*, 788-97.

<sup>7</sup> Welsh v. Bell, 8 Casey 12.

<sup>8</sup> Paxton v. Steckel, 2 Barr 95.

<sup>9</sup> Bogue v. Steel, D. C. Phila., Phila. Rep. 90. And see *ante*, 796, as to partnership goods.



cient to put the sheriff on his guard, so that he might be sued as a trespasser as to all the goods which were honestly acquired: if, at the time of the levy, the sheriff knew or had notice that the vendee had made additions to the stock in the store out of his own means, and not out of the proceeds of the original stock, then the sheriff would be liable as a trespasser as to all such additional stock, unless he gave the vendee notice that he should be allowed to select out and take away the same.<sup>1</sup>

After the termination of a bailment by delivery of the goods to the owner, the bailee's lien is gone, and a sale of the goods under an attachment against the bailee, would render the sheriff liable in trespass, although the owner had notice.<sup>2</sup> Where the purchaser kept the horse at livery, and allowed the vendor to have the frequent use of him, a levy and sale of the horse, as the property of the vendor, will render the sheriff liable in trespass to the purchaser.<sup>3</sup>

The action is to be brought by the injured party: where a wife's chattels are sold under execution against her husband, the action should be in the name of the husband and wife to the use of the wife, and not in the name of the wife alone.<sup>4</sup>

Where declarations of the claimant that the property belonged to the defendant in execution have been given in evidence by the officer, it is competent for the former to prove in rebuttal that he had, in the presence of the defendant in execution, pointed out the same property to the officer to answer an execution against himself.<sup>5</sup>

*Defences.*—The sheriff may show that an alleged purchase of the goods from the defendant by the claimant was fraudulent as to the creditors of the defendant.<sup>6</sup>

Where the sheriff seized goods in the *possession* of a stranger to the writ, he cannot justify under an authority from the real owner; the other will be entitled to nominal damages for the injury to his possession.<sup>7</sup> It is no defence as to the unlawful seizure and detention that the owner subsequently recovered his goods in replevin against the purchaser at the sale.<sup>8</sup> But he may show in mitigation of damages that the goods were bought in for the owner at an under price; the measure of damages is the extent of the loss sustained by the owner—what it cost him to redeem the goods.<sup>9</sup> And the sheriff cannot show, in mitigation of damages, that he has voluntarily applied part of the proceeds of the sale to pay a debt due by the owner of the goods, for he had no right to make any appropriation of the funds thus illegally obtained.<sup>10</sup> Where the sheriff has levied on and sold the same goods twice as the property of the defendant, in an action of trespass against him by the purchaser at the first sale, he is not estopped from showing that the first sale was

<sup>1</sup> *Helfrich v. Stem*, 5 Harris 144.

<sup>2</sup> *McGee v. Beirne*, 3 Wright 50.

<sup>3</sup> *Sutton v. Shearer*, 1 Grant 207.

<sup>4</sup> *Keeney v. Good*, 9 Harris 349.

<sup>5</sup> *Roberts v. Young*, 6 Wright 439.

<sup>6</sup> *Helfrich v. Stem*, 5 Harris 143.

And see this case for other grounds

of defence.

<sup>7</sup> *Rogers v. Fales*, 5 Barr 154.

<sup>8</sup> *Nagle v. Mullison*, 10 Casey 48.

<sup>9</sup> *Forsyth v. Palmer*, 2 Harris 96.

<sup>10</sup> *McMichael v. Mason*, 1 Harris 214;  
*Graham v. McCreary*, 4 Wright 515.

collusive; and the execution-creditor, in the second sale, may take defence in the suit, and show the fraud in the first sale.<sup>1</sup>

*Evidence.*—The defendant in the execution is competent to prove that the goods levied on belonged to the plaintiff in the action of trespass against the sheriff;<sup>2</sup> or that among the goods levied on were some that never had belonged to witness, and the value of such goods;<sup>3</sup> or that he had sold the goods to the plaintiff in the action of trespass.<sup>4</sup> Especially if the things levied on were part of the machinery of a mill erected on a leasehold in which the witness had assigned his interest to the plaintiff in the action of trespass without warranty.<sup>5</sup>

But where goods claimed by a stranger were levied on in the possession of the defendant in the execution, who claimed to hold them as agent of the owner, the declarations of the defendant are not admissible, in an action of trespass by the alleged owner against the sheriff, as evidence of fraud and collusion between the claimant and the defendant in execution, unless some evidence, however slight, be given of a common purpose or design between them.<sup>6</sup>

Where the execution-plaintiffs were a partnership, an agreement by one of them to indemnify the sheriff will not necessarily render the other incompetent to testify in his favor.<sup>7</sup>

*The measure of damages* is the extent of the loss sustained by the owner of the goods—what it cost him to redeem them.<sup>8</sup> Where the goods were seized *in transitu* the measure of damages is the value of the property at the place to which it was consigned, less the expense and charges of conveying it there.<sup>9</sup> Where the chattels were bought in for the plaintiff, and his possession remained undisturbed, the measure of damages is, not the value of the articles with interest, but the sum bid at the sale with the interest thereon.<sup>10</sup>

*Of the officer's compensation.*—The sheriff is entitled by law to certain fees for executing writs of execution. These will be found in the Fee Bill,<sup>11</sup> and need not be specified here.

He is also entitled, on the execution of the writ, to certain compensation termed poundage. This is a commission on the real debt, or on the money actually received and paid over to the creditor, if the whole debt is not collected. The amount of such commission is two per cent. on sums not exceeding three hundred dollars, one per cent. on the amount exceeding three hundred dollars and less than one thousand dollars, and one-half per cent. on the amount in excess of one thousand dollars.<sup>12</sup> Poundage is uniformly allowed on payment of all judgments and mortgages prior to the judgment on which the sale was made.<sup>13</sup> On the same principle it is allowed on the amount of liens paid, although they may have been subsequent to that under

<sup>1</sup> McMichael v. McDermott, 5 Harris 353.

<sup>2</sup> Forsyth v. Palmer, 2 Harris 96.

<sup>3</sup> Helfrich v. Stem, 5 Harris 143.

<sup>4</sup> Graham v. McCreary, 4 Wright 515.

<sup>5</sup> McInroy v. Dyer, 11 Wright 118.

<sup>6</sup> McDowell v. Rissell, 1 Wright 164.

<sup>7</sup> Thompson v. Franks, 1 Wright 327.

<sup>8</sup> Forsyth v. Palmer, 2 Harris 96.

<sup>9</sup> Eby v. Schumacher, 5 Casey 40.

<sup>10</sup> McInroy v. Dyer, 11 Wright 118.

<sup>11</sup> See Purd. Dig. 454 *et seq.*, tit. "Fees."

<sup>12</sup> Act 22d Feb. 1821, § 3, Purd. Dig. 457, pl. 15, 7 Sm. Laws 368.

<sup>13</sup> Petry v. Beauvarlet, 1 Binn. 97.

which the land was sold.<sup>1</sup> And after a levy on which an inquisition is held, land condemned, and a *venditioni exponas* issued, but countermanded by the plaintiff's attorney, the sheriff is entitled to the same commission if the plaintiff receives his debt and costs as if the land had been sold.<sup>2</sup>

The sheriff is entitled to poundage upon a *liberari facias*, but if the land be sold under a subsequent execution before the expiration of the term, he cannot charge poundage on such subsequent execution on the balance remaining due to the first creditor.<sup>3</sup>

The Act of 1795,<sup>4</sup> in giving poundage upon a *ca. sa.*, confines it to cases where the money has been paid and received; and though hard upon the sheriff, the court cannot allow what the act refuses.<sup>5</sup> The charge of poundage, where the defendant was discharged from a *ca. sa.* upon giving the plaintiff his promissory notes, was held improper, and was struck from the bill of costs.<sup>6</sup>

*Expenses.*—The sheriff cannot charge the fund with the expenses of selling the goods by auction, because he is bound to sell them himself; yet if the auction be at the request of either party, that party must pay such expenses.<sup>7</sup> So he cannot charge the expense of arranging the goods for sale, although with a view of making them bring a better price;<sup>8</sup> nor for a crier;<sup>9</sup> nor for a watchman;<sup>10</sup> although the plaintiff's attorney requested him to put a watchman in charge, for such direction is simply a notice to sheriff that he would be held to his legal responsibility if he suffered them to remain in the possession of the defendant, and they were lost.<sup>11</sup> Though, if the plaintiff himself employed the watchman, he would be liable for his services.<sup>12</sup>

On taking an inquisition he cannot charge for the jury's expenses, nor for his own attendance.<sup>13</sup>

He is allowed, by the fee-bill, a fixed sum for advertising;<sup>14</sup> but since then it has been made obligatory upon him to advertise,<sup>15</sup> and it is presumed that he can charge the actual expense incurred in advertising.<sup>16</sup> Where he has not been compelled to pay interest, he cannot recover interest on a bond for purchase-money.<sup>17</sup>

<sup>1</sup> Shoemaker v. Houtford, 1 Browne 251; Evans v. Elmes, D. C. Phila., 2 P. L. J. 216.

<sup>2</sup> Middleton v. Summer, 3 S. & R. 549.

<sup>3</sup> Wall v. Lloyd's Executors, 1 S. & R. 320.

<sup>4</sup> Act 20th April 1795, § 1, 3 Sm. Laws 255, supplied by Act 22d February 1821, § 3, Purd. Dig. 458, pl. 15, 7 Sm. Laws 369.

<sup>5</sup> Milne v. Davis, 2 Binn. 137. See 5 T. R. 470.

<sup>6</sup> Bank v. Malcomb, 1 Browne 234.

<sup>7</sup> 1 Arch. Pr. 263-4.

<sup>8</sup> Miles v. Huber, D. C. Phila., 3 P. L. J. 154.

<sup>9</sup> Browne v. Brown, 1 Browne 98.

<sup>10</sup> Miles v. Huber, D. C. Phila., 3 P.

L. J. 154; Patton's Estate, 2 Par. 103.

<sup>11</sup> Deal v. Tower, D. C. Phila., 8 Leg. Int. 238.

<sup>12</sup> Dumber v. Jones, 1 Ashm. 215.

<sup>13</sup> Wall v. Lloyd's Executors, 1 S. & R. 320; Middleton v. Summers, 3 Ibid. 550.

<sup>14</sup> Act 22d February 1821, § 3, Purd. Dig. 457, pl. 15, 7 Sm. Laws 368.

<sup>15</sup> By Act 16th June 1836, § 63, Purd. Dig. 442, pl. 74. See Kern v. Murphy, 2 Miles 160.

<sup>16</sup> See Act 14th April 1840, § 8, Purd. Dig. 442, pl. 73, extended to sheriffs' sales in Philadelphia by Act 8th February 1848, § 7, Pamph. L. 26.

<sup>17</sup> Gardner v. Klinefelter, 9 W. & S. 60.

The sheriff may maintain an action for his poundage,<sup>1</sup> or he may retain it out of the money levied on the execution. And where the sale was under a junior lien the sheriff's costs are payable out of the fund, though it is exhausted by the prior liens before reaching that under which the sale was made.<sup>2</sup> But the plaintiff has no right to receive from the defendant the costs and fees of the officer; and his receipt therefor will not discharge the defendant, but an execution may issue against the latter, notwithstanding the receipt of the plaintiff has been filed, acknowledging satisfaction in full of the debt, interest, and costs of the judgment.<sup>3</sup>

The officer cannot, however, refuse to execute a writ until his fees are paid.<sup>4</sup> But sheriffs in Luzerne, Clearfield, Schuylkill, Perry, and Philadelphia, may refuse to return writs of *capias* in trespass or case until their fees are paid.<sup>5</sup> And in Wayne county, notwithstanding the writ is stayed by order of plaintiff, he may refuse to return it unless his costs are paid, and may proceed on it to collect his costs.<sup>6</sup>

If the officer charge excessive fees, or charge for services not compensated by the fee-bill, he is liable to a penalty of fifty dollars to the injured party, to be recovered in like manner as debts of that amount.<sup>7</sup> The action must be brought within six months.<sup>8</sup> The officer must, if requested, furnish a bill of particulars of charges, and a receipt; if he refuse, the party may refuse to pay his fees,<sup>9</sup> and he is liable to a penalty of ten dollars in the case of a constable, and of fifty dollars in the case of a sheriff, or coroner acting as sheriff.<sup>10</sup>

In an action to recover the penalty for taking fees not compensated by the act, it is sufficient to aver that the fees were taken for services other than those provided for by the act, without specifying for what services the fees were demanded.<sup>11</sup>

Taking illegal fees is also a misdemeanor; but the prosecution must be commenced within a year.<sup>12</sup>

9. *Of the form of the writ, and of the endorsement; and herein of the amount for which it may issue.*

The writ bears *teste* in term time, and is made returnable on the several return days in the same manner as original process, except that no time is limited between the issuing and return day. And it seems that the intervention of a term between the issuing and the return day is not an irregularity.<sup>13</sup>

*The return day* is in general the first day of the term. In the

<sup>1</sup> 2 Ld. Raym. 1212; 1 Salk. 331. See 4 M. & S. 256.

<sup>2</sup> Shelly's Appeal, 2 Wright 210.

<sup>3</sup> Ellsbro v. Ellsbro, 4 Casey 172.

<sup>4</sup> 1 Salk. 330-332.

<sup>5</sup> Act 17th February 1859, § 2, Purd. Dig. 897, pl. 29, Pamph. L. 54; Act 26th March 1860, § 1, Purd. Dig. 897, pl. 30, Pamph. L. 270.

<sup>6</sup> Act 23d March 1865, § 1, Purd. Dig. 1412, pl. 1, Pamph. L. 585.

<sup>7</sup> Act 28th March 1814, § 26, Purd. Dig. 472, pl. 78, 6 Sm. Laws 234.

<sup>8</sup> Act 22d Feb. 1821, § 15, Purd. Dig.

473, pl. 84, 7 Sm. Laws. 377.

<sup>9</sup> Act 28th March 1814, § 27, Purd. Dig. 473, pl. 79, 6 Sm. Laws 235.

<sup>10</sup> Act 28th March 1820, § 3, Purd. Dig. 473, pl. 80, 7 Sm. Laws 308; Act 15th April 1824, § 79, Purd. Dig. 473, pl. 81, Pamph. L. 551.

<sup>11</sup> Overholtzer v. McMichael, 10 Barr 139.

<sup>12</sup> Act 25th March 1831, § 1, Pamph. L. 211, supplied by Act 31st March 1860, § 12, Purd. Dig. 219, pl. 14, 473, pl. 86, Pamph. L. 387.

<sup>13</sup> Ingham v. Snyder, 1 Whart. 116.

District Court of Philadelphia the third Monday of September,<sup>1</sup> and the first Monday of every other month, are return days.<sup>2</sup> In the District Court of Allegheny the first Monday of every month and the first day of each term, are return days.<sup>3</sup> And so in the Fourteenth,<sup>4</sup> Tenth,<sup>5</sup> and Sixth<sup>6</sup> Judicial Districts. And under an act creating new terms in the Sixth District, executions are returnable to such new terms.<sup>7</sup>

In the Supreme Court the first and last day of every term are return days,<sup>8</sup> as well as the last Monday in July;<sup>9</sup> and this court has power to appoint special return days.<sup>10</sup>

In the Supreme Court at Nisi Prius the first Monday of every month is a return day.<sup>11</sup>

Where the filing of the writ is merely formal, as in the case of a *fi. fa.* whereon to ground a *testatum*, the *fi. fa.*, though issued after the term has commenced, may be made returnable on the second return day; but on judgment had in term an effective *fi. fa.* cannot issue, returnable to the last day of the same term, though goods only are to be levied on.<sup>12</sup>

*Defective and irregular writs.*—If it is irregular the defendant may move the court to set it aside. And this is the proper course, instead of going to the Supreme Court for relief on error.<sup>13</sup> A misrecital in the body of the writ does not render it void or affect the right of an officer to justify under it.<sup>14</sup> An execution is good until reversed: it cannot be examined collaterally.<sup>15</sup> It is amendable:<sup>16</sup> thus an erroneous *teste* of a *fi. fa.* by the clerk was amended, though executed.<sup>17</sup> And the court will permit the *teste* and the return day of the *fi. fa.* to be amended by the *præcipe*.<sup>18</sup> And after error brought the Supreme Court will issue a *certiorari* to bring up the *præcipe* to amend the writ by, the power of the court above to amend having been asserted and exercised from the earliest period.<sup>19</sup> "In matters arising from the mere *carelessness of the clerk in process*, it is to be observed, that those things which are amendable before error brought are amendable afterwards, and if the inferior court doth not amend, then the superior court may amend them."<sup>20</sup> But the defendant in error must pay the costs of the amendment,<sup>21</sup> and executions.<sup>22</sup> So where the judgment and *fi. fa.* differ, the

<sup>1</sup> Act 4th April 1866, § 1, Purd. Dig. 1423, pl. 1, Pamph. L. 498.

<sup>2</sup> Act 28th March 1835, § 1, Purd. Dig. 336, pl. 7, Pamph. L. 88.

<sup>3</sup> Act 12th June 1839, § 4, Purd. Dig. 343, pl. 54, Pamph. L. 261.

<sup>4</sup> Act 6th June 1839, § 2, Purd. Dig. 803, pl. 8, Pamph. L. 254.

<sup>5</sup> Act 20th Feb. 1854, § 2, Pamph. L. 86.

<sup>6</sup> Act 17th April 1856, § 4, Purd. Dig. 164, pl. 156, Pamph. L. 396.

<sup>7</sup> Ibid. Bunn v. Wightman, 5 Casey 335.

<sup>8</sup> Act 14th April 1834, § 11, Purd. Dig. 927, pl. 11, Pamph. L. 343.

<sup>9</sup> Ibid. § 13.

<sup>10</sup> Ibid. § 14.

<sup>11</sup> Walker's Court Rules 99. Act 26th July 1842, § 7, Purd. Dig. 930, pl. 43, Pamph. L. 432.

<sup>12</sup> Baker v. Smith, 4 Yeates 185; Ewing v. McNair, Ibid. 192.

<sup>13</sup> Duncan v. Harris, 17 S. & R. 436.

<sup>14</sup> Keeler v. Neal, 2 Watts 424.

<sup>15</sup> Stewart v. Stocker, 1 Watts 135; a. c., 13 S. & R. 199.

<sup>16</sup> See, generally, "Amendment," Vol. II.

<sup>17</sup> Baker v. Smith, 4 Yeates 185.

<sup>18</sup> Berthon v. Keeley, 4 Yeates 205.

<sup>19</sup> Prevost v. Nicholls, 4 Yeates 483.

<sup>20</sup> 8 Co. 162, a.

<sup>21</sup> Gilbert Hist. C. P. 167.

<sup>22</sup> Peddle v. Hollingshead, 9 S. & R. 284.

latter may be amended by the former;<sup>1</sup> and where a *fi. fa.* after levy, but before sale, was destroyed by accident, the court granted permission to make out a new *fi. fa.* to be delivered to the sheriff.<sup>2</sup> After many years it will be presumed in support of a title that the lost *præcipe* contained a direction for a writ which would have authorized a sale; and the court will amend the writ according to the levy, where it appears by the deed that all the land levied on was actually sold.<sup>3</sup> So where the body of the writ related to a different suit from that set out in the *præcipe*, in the endorsement, the *venditioni*, and the sheriff's deed, the court will amend the body of the writ to correspond with the rest of the proceedings.<sup>4</sup>

An omission, in an *alias* or *pluries* writ, to recite the proceedings under the first execution, does not render such *alias* or *pluries* writ void.<sup>5</sup>

The writ must follow the judgment, both as to parties<sup>6</sup> and amount. Thus in a suit against three and judgment against one only, an execution against all the defendants is erroneous.<sup>7</sup> So under a joint judgment the execution should be joint.<sup>8</sup> But this last rule is technical and has more of form than substance in it, and the court will take care that it be not so used as to work injustice.<sup>9</sup>

*Endorsement.*—The prothonotary endorses on the execution the amount of the actual debt, and the time from which interest is to be calculated, together with the costs of suit, as a direction to the sheriff for the sum which he is to levy; the sheriff adds to these his fees and poundage, and levies for the whole. If the defendant complains that injustice has been done him, immediate and liberal relief will be given, either by the court on motion or by a judge at his chambers, upon laying before him a proper case verified by oath.<sup>10</sup>

It is the sheriff's duty in levying to be governed by the amount endorsed on the *fi. fa.*, and not by that contained in the body of the writ, which is often nominal. The endorsement is an official act, and must be taken to be correct until the contrary is shown;<sup>11</sup> and this rule applies to the amount of costs endorsed, as well as to the debt to be levied, though the endorsement being a matter *in pais*, the sheriff, in an action against him by the plaintiff in the execution, may show that it was not the act of the proper officer, or that it was improperly made.<sup>12</sup> And where the endorsement corresponded with the *præcipe*, but the body of the writ had relation to a different suit, and the levy, *venditioni*, and sheriff's deed corresponded with the *præcipe* and endorsement, the Supreme Court held that the body of the writ was amendable to correspond with the other process, and that the sheriff's vendee had a good title.<sup>13</sup>

<sup>1</sup> Black v. Wistar, 4 Dall. 267.

<sup>2</sup> 3 Johns. 448.

<sup>3</sup> De Haas v. Bunn, 2 Barr 339.

<sup>4</sup> Owen v. Simpson, 3 Watts 87.

<sup>5</sup> Coleman v. Mansfield, 1 Miles 56.

<sup>6</sup> See ante, 851, 2.

<sup>7</sup> Breidenthal v. McKenna, 2 Harris 160.

<sup>8</sup> Shaffer v. Watkins, 7 W. & S. 219;

Gibbs v. Atkinson, 3 P. L. J. 139.

<sup>9</sup> Mortland v. Himes, 8 Barr 265.

And see ante, 852.

<sup>10</sup> Lewis v. Smith, 2 S. & R. 155.

<sup>11</sup> Commonwealth v. McCoy, 8 Watts 155.

<sup>12</sup> Ibid.

<sup>13</sup> Owen v. Simpson, 3 Watts 87.

*Amount of the execution.*—In general the plaintiff is entitled to levy the amount of the judgment with interest, and costs of suit and of the execution. And interest is now allowed on a verdict from its date.<sup>1</sup> There may sometimes be a question as to the amount of costs which may be included in the execution. Thus where several actions are brought against different parties for the same debt, as upon a promissory note, bail-bond, or bill of exchange, each defendant is liable to execution for the whole debt, and the costs of the action against himself, but not for the costs of the actions against the others.<sup>2</sup> But where one of the defendants is the principal debtor, and the others were only secondarily liable as guarantors or sureties, the court, before staying proceedings in the action against the principal, will require him to pay the costs in the other actions, as well as the debt and the costs in the action against himself.<sup>3</sup> But in suits of this character the plaintiff can only levy one attorney fee for the whole.<sup>4</sup> This does not apply to defendants in such suits.<sup>5</sup> *A. fi. fa.* cannot include commissions for collection not embraced in the judgment, such commissions not being costs.<sup>6</sup> The general subject of costs has been already explained.<sup>7</sup> Where the bill of costs included in an execution had not been taxed, the District Court of Philadelphia refused to quash the writ on that ground.<sup>8</sup>

The sum stated in a recognisance is the amount which the recognisor binds himself to pay, and execution cannot issue for a greater amount than that sum.<sup>9</sup>

*In debt on a bond*, where judgment is obtained for the penalty the plaintiff cannot by his execution collect more than the sum mentioned in the condition of the bond, with interest and costs,<sup>10</sup> although the bond was given for a debt exceeding the amount of the condition.<sup>11</sup>

And where debt is brought to recover the interest due on a bond, the principal of which is payable by instalments at distant days, judgment is entered for the penalty, with leave to take out execution in the first instance for the amount of interest due at the commencement of the suit;<sup>12</sup> for the principal and interest subsequently accruing, the former practice was for the plaintiff to move the court for leave to take out execution, to which the defendant might make any defence (on an issue framed if necessary) other than that which had been tried.<sup>13</sup> But subsequently<sup>14</sup> the Supreme Court decided that the plaintiff could not have his execution for the subsequently-accrued principal and interest upon simple motion, but must take

<sup>1</sup> Act 6th April 1859, § 1, *Purd. Dig.* 561, pl. 7, *Pamph. L.* 381. Interest on the judgment is given by the Act of 1700, § 2, 1 *Sm. Laws* 7; *Purd. Dig.* 561, pl. 6.

<sup>2</sup> *Tidd* 997.

<sup>3</sup> *Chitty on Bills* 473.

<sup>4</sup> Act 11th April 1825, § 1, *Purd. Dig.* 812, pl. 5, *Pamph. L.* 225; 8 *Sm. Laws* 471.

<sup>5</sup> *Columbia Bank v. Haldeman*, D. C. Lancaster, 5 P. L. J. 28.

<sup>6</sup> *Mahoning Bank's App.*, 8 *Casey* 158.

<sup>7</sup> *Ante*, 717 *et seq.*

<sup>8</sup> *Hart v. Dickerson*, D. C. Phila., July 1848.

<sup>9</sup> *Fletcher v. Ticknor*, C. P. Phila., 1 *Phila. Rep.* 527.

<sup>10</sup> 1 *Saund.* 58, a.; 12 *Johns* 350. See *ante*, 413 *et seq.*

<sup>11</sup> 2 *Caines* 256.

<sup>12</sup> *Sparks v. Garrigues*, 1 *Binn.* 152.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Longstreth v. Gray*, 1 *Watts* 60.

out a *scire facias* suggesting the breaches as prescribed by the stat. 8 & 9 W. III. c. II. § 8.<sup>1</sup> But a judgment entered by virtue of a warrant of attorney is not within the stat. 8 & 9 W. III.<sup>2</sup>

So a judgment may, by agreement of the parties, be entered up for a debt then due, and also as a security for future advances to the defendant; and the plaintiff may collect by execution, not only the sum actually due at the time the judgment was rendered, but the amount subsequently advanced to the defendant, provided the whole does not exceed the amount in the condition of the bond on which the judgment is given.<sup>3</sup>

And in executions on judgments confessed the court has control of the whole matter, and may reduce the amount if it is ascertained to be excessive.<sup>4</sup>

#### 10. *Of the return and its incidents.*

The sheriff is not in strictness bound to return executed writs of execution. He may be ruled to do so by the plaintiff or defendant, and if he neglect to make his return before the expiration of the rule, the court upon motion will grant an attachment against him.<sup>5</sup> The several courts of the commonwealth have power, by Act of Assembly, to issue attachments for enforcing the return of any writ for the payment of money received on any execution, and for the production of the body after a return of *cepi corpus*, or, in default thereof, for the payment of the debt and costs; and this power extends against former sheriffs and coroners.<sup>6</sup> If the property of the goods be in dispute, the court, upon this or any other reasonable cause, will enlarge the time for making the return until sufficient indemnity be given.<sup>7</sup> This indulgence will, however, be granted only in very special cases; it will be generally extended when the doubt arises from a point of law, and not mere matter of fact.<sup>8</sup> The sheriff ought not to wait until he has been ruled to return the writ, for the plaintiff, without proceeding by attachment, has an election to commence an action on the case in the first instance.<sup>9</sup> But his omission to return an execution until after the return day is not of itself such negligence as subjects him to an action.<sup>10</sup> When the writ remains unreturned for years, the sheriff is presumed to have collected the money; and he must rebut that presumption by proof that he did not, and why.<sup>11</sup> But on sale of real estate in execution, the sheriff must return the writ.<sup>12</sup> A judge has no power to order an execution to be returned before the return day; such order is void for want of power to make it.<sup>13</sup> An agent

<sup>1</sup> Rob. Dig. 142. See *ante*, 416.

<sup>2</sup> Longstreth v. Gray, 1 Watts 60; Harger v. Commissioners, 2 Jones 253; Reynolds v. Lowry, 6 Barr 465.

<sup>3</sup> 16 Johns. 165. See *vide* 4 Johns. Ch. R. 247.

<sup>4</sup> Skidmore v. Bradford, 4 Barr 296. And see *ante*, 842-4.

<sup>5</sup> 1 Arch. Pr. 262.

<sup>6</sup> 7 Rev. Laws 496.

<sup>7</sup> Tidd 1017, and see 7 Taunt. 294.

<sup>8</sup> See 1 Arch. Pr. 262.

<sup>9</sup> See 2 Dunl. Pr. 775, and authorities there cited.

<sup>10</sup> Commonwealth v. Magee, 8 Barr 248.

<sup>11</sup> Commonwealth v. McCay, 8 Watts 153.

<sup>12</sup> Act 16th June 1836, § 94, Purd. Dig. 448, pl. 114, Pamph. L. 778. And see *post*, Sect. IV., "Return to Venditioni."

<sup>13</sup> Irons v. McQuewan, 3 Casey 196.



of the sheriff's deputy is a competent witness for the sheriff in an action against him for not returning the writ, &c.<sup>1</sup>

The return is made on the back of the writ, which is filed with the prothonotary before or on the day when the rule to return it expires.

The court will sometimes enlarge the time for returning the writ by granting a rule to stay proceedings, on the application of the sheriff, until indemnity has been furnished him by the plaintiff, when the goods are claimed as the property of a stranger to the execution. This will be explained elsewhere.<sup>2</sup>

The return can be validly made only by the sheriff himself. By the stat. 12 Ed. II. c. 25, in force here, he is commanded to put his name to it, that the court may know whose it is. Therefore a return by an undersheriff is erroneous, though purporting to be in the sheriff's name: still, it may be ratified by the sheriff so as to charge his sureties by delay to move to set it aside.<sup>3</sup> Parol evidence is inadmissible to show that the return of a sheriff found in the office in the regular way, and purporting to have been made by him, was not in the sheriff's handwriting.<sup>4</sup> The proper and safe rule is for the sheriff personally to sign returns; this is his duty, and it is clearly his interest, as he is then obliged to supervise the acts of his subordinates; but the return is formal if in the name of the sheriff, and signed by his authorized deputy, whose acts in such case are his acts.<sup>5</sup>

It is of no consequence on whose information the sheriff relies for the truth of the return;<sup>6</sup> but it will not excuse him, in an action for a false return, that he was misled either by the mistake or misrepresentation of his deputy.<sup>7</sup>

*Form.—Amendments.*—The form of the return varies so much, according to circumstances, that an explanation of it must be deferred till we come to treat of each kind of execution separately.

When an error or mistake is made by the sheriff, he should apply to the court for leave to amend his return, which privilege will not be granted if intervening rights would thereby be prejudiced.<sup>8</sup> The court can grant leave to the sheriff to amend, but can-

<sup>1</sup> *Commonwealth v. Allen*, D. C. Phila., 2 Phila. Rep. 22.

<sup>2</sup> *Vide ante*, 858, and *post*, Sect. II., "Proceedings where goods are claimed by a stranger."

<sup>3</sup> *Beale v. Commonwealth*, 7 Watts 186.

<sup>4</sup> *Sample v. Coulson*, 9 W. & S. 62.

<sup>5</sup> *Emley v. Drum*, 12 Casey 123; *Rudy v. Commonwealth*, 11 Ibid. 166.

<sup>6</sup> *Meutz v. Hamman*, 5 Whart. 153, per ROGERS, J.

<sup>7</sup> Ibid.

<sup>8</sup> *Keyser v. Sutton*, D. C. October 5th 1849. Why sheriff should not have leave to amend. *Per curiam*. The depositions show a plain mistake of the officer; and we see no reason why he should not be permitted to amend.

While each party is left to pursue his remedies against the sheriff, the court will allow him to make such a return as appears supported by the facts of the case. Though a levy was made under the last writs subject to the first, it clearly appears there was no lien of the first writs, and though the sale was made under all the writs, it derived its force and effect from the last writs only. Rule absolute.

*Cadbury v. Duval*. June 30th 1849. Why leave to sheriff to amend should not be withdrawn. *Per curiam*. Upon the 6th of March 1848, the sheriff made sale under a *venditioni exponas* to F. B. Seybert, which he returned accordingly, but that Mr. Seybert had failed to comply with the terms of said sale, and

not force him to do so.<sup>1</sup> But where real estate has been sold in execution the court may correct and amend a defective or formal return.<sup>2</sup> No amendment should be allowed except for reasons expressly stated and sworn to in the affidavit accompanying the application; amendments in other particulars than those stated in the affidavit, on which the order to amend is made, are nullities as to other creditors, and are no evidence of the facts thus stated; in contemplation of law the amendment is made when allowed, the affidavit being a sufficient material from which to reduce it to form when necessary.<sup>3</sup>

A sheriff out of office cannot amend his return, there being an action pending against him for a trespass committed under the writ.<sup>4</sup>

The Circuit Court will not dictate to the marshal what return he shall make to process in his hands; he must make a return at his peril, and if false or insufficient, any person injured may have a legal remedy.<sup>5</sup>

It is not essential to the validity of a return to an execution against land that it should set forth the deed or title under which the defendant holds.<sup>6</sup>

*Effect. As to the officer.*—The sheriff's return is as between the parties conclusive against him, so that he cannot contradict it,<sup>7</sup> or avoid its legal effect either directly or indirectly; thus, where the sheriff had attached a levy to a *fi. fa.*, but had appropriated the proceeds of the sale to a prior execution against the same goods to which a levy, although actually made, had not been attached; it was held that he could not, in an action against him for misappropriating the proceeds of sale, be allowed to show that a levy had been actually made under the first execution, by producing a paper purporting to be a levy, in connection with proof that it was the levy made, although it was not attached to the execution.<sup>8</sup>

A return of "money made" to a *venditioni* discharges the debt, and fixes the sheriff for the money, in the same manner as such return to a *fi. fa.*; <sup>9</sup> the price is thenceforth a matter between the

that the premises remained in his hands unsold for want of buyers. Upon the 19th May 1849, Mr. Seybert, through counsel, applied to the court and obtained leave for the sheriff to amend his return, the sheriff acquiescing. It appears that the purchaser, having at first declined, is now willing to take the property. A motion has now been made in behalf of other judgment-creditors to the court to rescind the leave thus given. The granting or withholding leave to amend is a matter within the sound discretion of the court. In reference to the sheriff, it is exercised principally for his relief. We do not think that this amendment ought to have been granted, unless under more special circumstances than have been shown. After the lapse of more than a year to amend a sheriff's return, not to correct an error or to

relieve the sheriff from liability on account thereof, but to make that which was true speak false for the accommodation of a purchaser who now sees that his bargain was a good one, would not be, in our opinion, the exercise of a sound discretion. Rule absolute.

<sup>1</sup> *Vastine v. Fury*, 2 S. & R. 426; *Maris v. Schermerhorn*, 3 Whart. 13; *Boaz v. Updegrove*, 5 Barr 516.

<sup>2</sup> Act 21st April 1846, § 1. See *post*, Sect. IV., "Return to Venditioni."

<sup>3</sup> *Lowry v. Coulter*, 9 Barr 349.

<sup>4</sup> *McElrath v. Kintzing*, 5 Barr 336.

<sup>5</sup> *Wortman v. Conyngham*, 1 P. C. C. 241.

<sup>6</sup> *Buckholder v. Sigler*, 7 W. & S. 154.

<sup>7</sup> *Paxton v. Steckel*, 2 Barr 95.

<sup>8</sup> *McClelland v. Slingluff*, 7 W. & S. 134; *Kintzing v. McElrath*, 5 Barr 466.

<sup>9</sup> *Boaz v. Updegrove*, 5 Barr 516, citing *Freeman v. Caldwell*, 10 Watts 9.

sheriff and the purchaser.<sup>1</sup> But a general return of goods levied, whereby it does not clearly appear that they were insufficient to pay the debt and costs, does not discharge the defendant and make the sheriff liable for the whole debt.<sup>2</sup> But a return, if levied on certain specified articles, "together with the whole of the defendant's personal property," is *prima facie* evidence of a levy to the amount of the debt, and throws the burden of showing the nature and value of the goods upon the officer.<sup>3</sup>

The return is evidence in favor of the sheriff; thus a return to a *venditioni* that he had sold the land to A. is *prima facie* evidence of the sale, &c., in an action by the sheriff against A. to recover the purchase-money.<sup>4</sup> But the return is no evidence of a levy, in replevin by the sheriff, for the goods.<sup>5</sup>

And the return being always under the sheriff's own control, and always evidence for himself, should be construed rigorously against him; hence, a written demand for the benefit of the Exemption Law, dated the day the *fi. fa.* came into his hands, and returned by him attached to the *fi. fa.* without explanation, is, in a suit against him for disregarding the claim, evidence that he received the demand in due time.<sup>6</sup>

*As to other persons.*—In an action between the parties to the writ the return cannot be traversed.<sup>7</sup> A party may make an averment consistent with the return, or explanatory of its legal bearing and effect, when the return is at large; but he cannot aver a matter directly at variance with the facts stated in the return, contradictory to and falsifying it.<sup>8</sup> And the courts will not countenance the introduction of parol evidence to control a return, except in an action against the sheriff for misconduct.<sup>9</sup> But when the return is obscure, it may be shown by parol evidence what property is embraced in the levy.<sup>10</sup> And where it is ambiguous, parol proof of facts consistent with and not embraced in the return, may be heard in explanation, and to show the truth of the case.<sup>11</sup> So where the plaintiff is deprived of the fruit of his levy on goods, by the act of the law, not by anything he did or could have avoided, he cannot be deprived of his lien on defendant's land by the mere return of "levied;" the return is open to explanation by evidence of subsequent circumstances, the proceeds of chattels being distributable according to priority of lien.<sup>12</sup>

The return cannot be attacked collaterally; if it is false it can be impeached only in an action against the sheriff.<sup>13</sup> Thus, where several executions, at the suit of different plaintiffs, issued at dif-

<sup>1</sup> *Hinds v. Scott*, 1 Jones 27, per *Diller v. Roberts*, 13 S. & R. 60.

*BELL, J.*

<sup>2</sup> *Little v. Delancey*, 5 Binn. 272. And see *post*, Sect. II., "Effect of Levy."

<sup>3</sup> *Beale v. Worrell*, 11 S. & R. 299.

<sup>4</sup> *Hyskill v. Givin*, 7 S. & R. 369;

*Cash v. Tozer*, 1 W. & S. 519.

<sup>5</sup> *Snyder v. Beam*, 1 Browne 366.

<sup>6</sup> *Smith v. Emerson*, 7 Wright 456.

<sup>7</sup> *Wilson v. Hurst*, 1 P. C. C. 441;

<sup>8</sup> *Knowles v. Lord*, 4 Whart. 504;

*Jordan v. Minster*, 5 P. L. J. 542.

<sup>9</sup> *Mentz v. Hamman*, 5 Whart. 155, per *ROGERS, J.*

<sup>10</sup> *Scott v. Sheakly*, 3 Watts 50. See

*Burchard v. Rees*, 1 Whart. 377.

<sup>11</sup> *Shoemaker v. Ballard*, 3 Harris 92.

<sup>12</sup> *Taylor's Appeal*, 1 Barr 392. See

*Lytle v. Mehaffey*, 8 Watts 267.

<sup>13</sup> *Mentz v. Hamman*, 5 Whart. 155.

forerent times, and the sheriff returned to the first writs that he had levied and sold, and to the others that he had levied subject to prior writs, the subsequent execution-creditors will not be allowed to show, on the distribution, that the levies were not made under the first writs till after the return day: the parties all claim through the sheriff, and cannot contest the truth of his return in a controversy about the distribution of the proceeds; if the return is false, it may be made the foundation of a suit for damages.<sup>1</sup> And though it is true that a return made to one writ is not conclusive upon parties to the other writs, yet in this case the party sought to contradict the return to his own writ, *i. e.*, that the levy was made subject to prior writs, and this he could not do.<sup>2</sup>

But a fraudulent return which one execution-plaintiff has procured the sheriff to make to the writ of another creditor, cannot be set up by such execution-plaintiff in an action against him by the sheriff on a bond to deliver the goods; the fraud vitiates the return.<sup>3</sup>

And in an action against one who had guaranteed the payment of the debt by the execution-defendant, a return of "debt and costs paid," made two years after return day of the execution, and a year after the commencement of the action, was held not to be conclusive.<sup>4</sup>

So where the sheriff states facts unnecessarily, as where he particularizes the day upon which the arrest was made, the party is not bound by it.<sup>5</sup>

On a collateral issue between two creditors to try the right to the proceeds of a sheriff's sale of personalty, the return is but *prima facie* evidence.<sup>6</sup> So where the sheriff, under an execution against one partner levied on certain property, and afterwards under executions against all the partners levied on the same property, subject to the former levy, and returned accordingly, such return is not conclusive that the property levied on was that of the individual partner, but this fact may be inquired into on the distribution.<sup>7</sup> But where the sheriff had in his hands two executions of different dates, and returned the later writ "levied, subject to a prior levy," and the former "levied as per inventory, and sold for \$508," this return was held conclusive as to the right of the former execution, and parol evidence was not admissible to show that the return was false.<sup>8</sup> But it is not inconsistent with such return to show a private arrangement between the first execution-creditor and the defendant, unknown to the sheriff, not to have a sale of the defendant's goods, and parol evidence of this may be given.<sup>9</sup> Proof of a levy is not inconsistent with a return of "stayed."<sup>10</sup>

<sup>1</sup> *Savage v. Devereux*, D. C. Phila., 21 Leg. Int. 132; *Paxson's Appeal*, 13 Wright 195, S. C.

<sup>2</sup> *Ibid.*; *Hill v. Grant*, 13 Wright 200.

<sup>3</sup> *Evans v. Matson*, S. C., 23 Leg. Int. 84.

<sup>4</sup> *Weidman v. Weitzel*, 13 S. & R. 96.

<sup>5</sup> *Dolan v. Briggs*, 4 Binn. 500.

<sup>6</sup> *Lowry v. Coulter*, 9 Barr 349.

<sup>7</sup> *Vandike's Appeal*, 5 Harris 271.

<sup>8</sup> *Flick v. Troxell*, 7 W. & S. 65.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Farmers' and Drovers' Bank v. For-  
dyce*, 1 Barr 454.

The special incidents and characteristics of returns will be treated hereafter, when we come to discuss each particular writ.<sup>1</sup>

*Neglect or misconduct of officer.*—Should the sheriff go on to execution without resort to the safeguards of which he can avail himself,<sup>2</sup> and return the writ so as to render the judgment extinct, and delay and hinder its execution, to the plaintiff's injury, he does so at his own peril, and will be accountable.<sup>3</sup>

#### 11. *Liability of plaintiff in execution.*

All persons who direct or order the commission of a trespass, or the conversion of personal property, are in general liable as principals though not benefited by the act.<sup>4</sup> But if a person does not assist in a trespass, either in word or deed, he is not liable though it may have been done by a person assuming to act on his behalf.<sup>5</sup>

To render the plaintiff liable for the act of the officer in taking the goods of a stranger to the writ, he must have actually interfered or assented to the levy.<sup>6</sup> The mere fact that he issued the execution is not sufficient;<sup>7</sup> nor does the bare receipt from the officer of the proceeds of goods of a stranger, sold under execution, render the plaintiff liable as a trespasser.<sup>8</sup> He is not answerable for the blunders of the officer whose proceedings are not necessarily directed by him, but who acts at his own peril and by the direction of the writ.<sup>9</sup>

Nor is a *bond fide* purchaser without notice, at the sale of the goods of a stranger to the writ, liable in trespass for taking the property away;<sup>10</sup> though it is said that he is liable in trover.<sup>11</sup> But where partnership goods were sold under an execution against one member of the firm, the plaintiff, who attended the sale and purchased some of the goods, is such a participator as to be liable as a trespasser jointly with the sheriff and his deputy.<sup>12</sup>

In regard to what constitutes an interference, the plaintiff will become liable if he be in the company of the sheriff's officer at the time of the execution.<sup>13</sup> So if the plaintiff indemnify the sheriff for selling goods claimed by a stranger, this is sufficient interference to subject him to an action.<sup>14</sup> And one who indemnified the sheriff in such case is so far a principal in the trespass that he cannot be compelled to testify, although not joined in the suit; but his declarations against his interest may be proved.<sup>15</sup> And if the attorney of the plaintiff, retained generally to conduct the suit, but without special authority in reference to the execution, direct the sheriff to

<sup>1</sup> See *post*, Sects. II. to V.

<sup>2</sup> See *ante*, "Officer," &c., "Indemnity," and *post*, Sect. II., "Interpleader."

<sup>3</sup> *Miller v. Commonwealth*, 5 Barr 295.

<sup>4</sup> 1 Chitty's Plead. 90 (7th ed.).

<sup>5</sup> *Ibid.*

<sup>6</sup> *Sanderson v. Baker*, 3 Wils. 309; *Hettrich v. Karcher*, 2 Am. L. J. 84; *Tarr v. Voorhees*, D. C. Phila., 1 Phila. Rep. 74.

<sup>7</sup> *Tarr v. Voorhees*, D. C. Phila.,

1 Phila. Rep. 74.

<sup>8</sup> *Hettrich v. Karcher*, 2 Am. L. J. 84.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Hammon v. Fisher*, 2 Grant 330. And see 1 Chitty's Plead. 90 (7th ed.).

<sup>11</sup> *Farrant v. —*, 3 Stark. 130;

*Farrant v. Thompson*, 2 D. & R. 1.

<sup>12</sup> *Deal v. Bogue*, 8 Harris 228.

<sup>13</sup> *Menham v. Edmonson*, 1 Bos. & Pul. 369.

<sup>14</sup> *Bul. N. P.* 41.

<sup>15</sup> *Welsh v. Cooper*, 1 Am. L. J. 87; s. c., 8 Barr 217.

levy on goods which do not belong to the defendant, the plaintiff himself is liable in trespass to the owner of the goods.<sup>1</sup>

An attorney who issued the writ, but who took no part in the seizure of the goods of a stranger, is not liable in trespass to the owner.<sup>2</sup>

The plaintiff is also liable to the defendant for injuries done to his person or property, under color of process void on account of want of jurisdiction in the court.<sup>3</sup> So where the court has jurisdiction but the proceeding is irregular, an action lies against the attorney and the plaintiff.<sup>4</sup> As where a defendant who has sufficient property to satisfy the demand is arrested and imprisoned on a *ca. sa.*<sup>5</sup> Or the defendant is arrested on a judgment which is afterwards set aside for irregularity.<sup>6</sup> So if the plaintiff issue an execution not warranted by his judgment: as where a *ca. sa.* is sued out on a judgment against an administrator.<sup>7</sup>

But an erroneous judgment is good in law until reversed, and everything done under it before reversal is valid.<sup>8</sup> Hence an action of trespass will not lie against a plaintiff for selling defendant's goods in execution obtained before a justice of the peace, on the ground that the defendant in the judgment was never served with process.<sup>9</sup>

And on the same principle the plaintiff and constable executing an attachment under the 27th section of the Act of 12th July 1842,<sup>10</sup> are not liable to a stranger claiming the goods, on the ground that the affidavit and bond, upon which the judgment was founded, are defective.<sup>11</sup>

It is settled that before the plaintiff, &c., can be made liable as a trespasser for issuing a writ altogether irregular and defective, and therefore null and void, the writ must be first vacated or set aside by the court, for if it still subsist in full force and vigor at the time of the action brought, the party may justify under it.<sup>12</sup> This results from the principle that an execution, like a judgment, is valid until quashed or reversed, and cannot be assailed collaterally, except in case of fraud.<sup>13</sup>

It has been said, however, that a distinction exists between *erroneous* and *irregular* process; and that under the first a party may justify until it is reversed, but not so under an irregular process, because it was his own fault that it was irregular at first.<sup>14</sup>

#### 12. *Executions void or voidable.*

A distinction has long existed between process which is absolutely null and void, and in an action of trespass affords no justification whatever to the party issuing it, and process which is voidable merely. Where the process is altogether irregular and defective,

<sup>1</sup> *Gillingham v. Clark*, D. C. Phila., 1 Phila. Rep. 51.

<sup>2</sup> *Hammon v. Fisher*, 2 Grant 330.

<sup>3</sup> 1 Chitty's Plead. 203, 204 (7th ed.).

<sup>4</sup> *Ibid.* 206.

<sup>5</sup> *Allison v. Rheam*, 3 S. & R. 142; *Berry v. Hamill*, 12 *Ibid.* 210.

<sup>6</sup> *Phillips v. Biron*, 1 Strange 509.

<sup>7</sup> *Barker v. Braham*, 3 Wils. 368.

<sup>8</sup> *Allison v. Rheam*, 3 S. & R. 140.

<sup>9</sup> *Baird v. Campbell*, 4 W. & S. 191.

<sup>10</sup> *Purd. Dig.* 598, pl. 57.

<sup>11</sup> *Billings v. Russell*, 11 Harris 189.

<sup>12</sup> *Day v. Sharp*, 4 Whart. 341.

<sup>13</sup> See *Stewart v. Stocker*, 13 S. & R. 204.

<sup>14</sup> 3 Johns. 523.

it is considered as null and void; and if it be vacated or set aside by the court, the party who acted under it becomes a trespasser from the beginning; though the officer may be justified by the command of the writ, not being bound to look into it. Even there, however, before the party can be sued in trespass, the process must first be set aside or vacated; for if it still subsist in full force and vigor at the time of the action brought, the party may justify under it.<sup>1</sup> An execution until quashed or reversed is good, and cannot be questioned by a stranger to the writ, nor in any other case collaterally, except where there is collusion between the plaintiff and defendant in fraud of a third person.<sup>2</sup>

Where, however, the process is not totally defective and irregular, but merely erroneous and liable to be reversed on error, it is not void but voidable, and does not make the party issuing it a trespasser.<sup>3</sup>

*What executions are void, and what merely voidable.*—The line of distinction has not been accurately drawn, as to all the cases where the process is merely erroneous and those where it is an absolute nullity; and perhaps each case must depend in some measure upon its own circumstances.<sup>4</sup>

In general it may be said that an execution is void when the court whence it issued had no jurisdiction;<sup>5</sup> or where it is issued against the positive command of the law, as a *ca. sa.* against a defendant who has estate sufficient;<sup>6</sup> or is issued against a party not liable;<sup>7</sup> or is such as the judgment does not warrant, as a *ca. sa.* against an administrator;<sup>8</sup> or where there is no judgment at all, or the judgment has since been vacated for irregularity.<sup>9</sup>

Executions are merely voidable which are defective in form, as where the recitals in the writ are incorrect,<sup>10</sup> or where there is an omission in an *alias* to recite the proceedings under the former writ.<sup>11</sup> If the writ issues for a larger amount than is due it is not void, but the court will rectify the error on the distribution.<sup>12</sup>

So an execution issued before the expiration of the stay is not void, though it is irregular and will be set aside on motion.<sup>13</sup> So an execution issued after the expiration of a year and day without a *scire facias*, is only voidable.<sup>14</sup> So if issued after defendant's death without substituting his personal representative.<sup>15</sup> And where after death of the plaintiff, an execution issued in the name of his executors without a suggestion of the death and substitution of the exe-

<sup>1</sup> Day v. Sharp, 4 Whart. 341, SERGEANT, J.; Ibid. 343, citing Allison v. Rheam, 3 S. & R. 142; Berry v. Hamill, 12 Ibid. 210.

<sup>2</sup> Stewart v. Stocker, 13 S. & R. 204.

<sup>3</sup> Day v. Sharp, 4 Whart. 341.

<sup>4</sup> Day v. Sharp, 4 Whart. 342, SERGEANT, J.

<sup>5</sup> See Keeler v. Neal, 2 Watts 426; Frick v. Kitchen, 4 W. & S. 31; Hallowell v. Williams, 4 Barr 339; Commonwealth v. Magee, 8 Ibid. 246.

<sup>6</sup> Allison v. Rheam, 3 S. & R. 141; Berry v. Hamill, 12 Ibid. 212.

<sup>7</sup> See Day v. Sharp, 4 Whart. 342.

<sup>8</sup> Barker v. Braham, 3 Wils. 368.

<sup>9</sup> Phillips v. Biron, 1 Str. 509; Berry v. Hamill, 12 S. & R. 212, and cases there cited.

<sup>10</sup> Keeler v. Neal, 2 Watts 426.

<sup>11</sup> Coleman v. Mansfield, 1 Miles 56.

<sup>12</sup> Ibid.

<sup>13</sup> Stewart v. Stocker, 13 S. & R. 203.

<sup>14</sup> Patrick v. Johnson, 3 Lev. 404; Jackson v. Bartlett, 8 Johns. 361. And see Speer v. Sample, 4 Watts 373.

<sup>15</sup> Day v. Sharp, 4 Whart. 340.

cutors, the Supreme Court remitted the record, with directions to permit plaintiffs to make the suggestion and substitution *nunc pro tunc*.<sup>1</sup> And prior to the Act of 1834 an execution issued after defendant's death against land bound by the judgment, without notice to the heirs, was held not to be void but merely voidable;<sup>2</sup> though since the passage of that act such execution would probably be held void, as being against the positive command of the law.

Writs which are erroneous are not void but voidable;<sup>3</sup> as an *alias* issued while the former writ is outstanding,<sup>4</sup> but only the defendant can take advantage of this irregularity.<sup>5</sup>

*The effect of void and voidable writs.*—In this respect there is a difference between writs which are erroneous, and those which are issued irregularly and by the fault of the party.<sup>6</sup>

As we have just seen, the plaintiff is liable in trespass for issuing an irregular and void writ; but not if the writ is merely erroneous.<sup>7</sup> And at common law, process void for want of jurisdiction in the court will render the officer who executed it liable in trespass.<sup>8</sup> But this is remedied by statute as to constables.<sup>9</sup>

So a sale under a void writ passes no title to the land sold; though it is otherwise if the writ was merely voidable.<sup>10</sup>

Again, a void writ is incurably defective, but if it is merely voidable the defect may be cured by acts of the defendant which estop him from contesting its validity,<sup>11</sup> and sometimes by his delay in raising the question.

The proper mode of contesting a voidable writ is by applying to the court to set it aside. This subject has been explained above.

### 13. *Of lost executions.*

Where after the levy, but before the sale, the *fi. fa.* was destroyed by accident, the court granted permission to make out a new *fi. fa.* to be delivered to the sheriff.<sup>12</sup> So where a *testatum fi. fa.* was executed by the sheriff of the county to which it was directed, who endorsed his return on it and placed it in the post-office, directed to the prothonotary of the court whence it issued, but it was not received, the court ordered a duplicate writ to issue *nunc pro tunc*.<sup>13</sup>

Where the writ is lost after a sale of land under it, and the acknowledgment of the sheriff's deed, the recitals in the deed, duly attested by the prothonotary, will be evidence of the facts therein set forth in the same manner as the original records would be if produced.<sup>14</sup> And where the *ven. ex.* has been lost, but there is evidence from the docket entries and *aliunde* that several lots, as numbered on a plan, were sold under it, the deed may be used as evidence to identify the lots sold to particular individuals.<sup>15</sup> It is

<sup>1</sup> *Darlington v. Speakman*, 9 W. & S. 182.

<sup>2</sup> *Speer v. Sample*, 4 Watts 368.

<sup>3</sup> *Allison v. Rheam*, 3 S. & R. 141.

<sup>4</sup> *Coleman v. Mansfield*, 1 Miles 56.

<sup>5</sup> *Potts's Appeal*, 8 Harris 253.

<sup>6</sup> *Allison v. Rheam*, 3 S. & R. 140.

<sup>7</sup> *Ibid.*

<sup>8</sup> See *Keeler v. Neal*, 2 Watts 426; *Frick v. Kitchen*, 4 W. & S. 31; *Com-*

*monwealth v. Magee*, 8 Barr 247.

<sup>9</sup> Act 21st March 1772, § 6, *Purd.* Dig. 187, pl. 38; 1 Sm. Laws 365.

<sup>10</sup> *Speer v. Sample*, 4 Watts 368.

<sup>11</sup> *Coleman v. Mansfield*, 1 Miles 59.

<sup>12</sup> 3 Johns. 448.

<sup>13</sup> *Clark v. Field*, 1 Miles 244.

<sup>14</sup> Act 16th June 1836, § 95, *Purd.* Dig. 448, pl. 115, *Pamph. L.* 778.

<sup>15</sup> *Woods v. Halsey*, 9 Barr 144.



settled that docket entries are admissible in evidence where the writs are lost.<sup>1</sup>

11. *Effect of a reversal of judgment after sale.*

By the 9th section of the Act of 1705,<sup>2</sup> the purchaser is protected in the event of a reversal of the judgment under which the sale took place, even where the judgment was totally void;<sup>3</sup> but not where the sale was made under void process.<sup>4</sup> This section is agreeable to the common law.<sup>5</sup> And it makes no difference whether the reversal is for matter of fact or of law;<sup>6</sup> nor whether the plaintiff or a stranger is the purchaser.<sup>7</sup>

In case of reversal the act provides that none of the lands, tenements, or hereditaments so sold shall be restored, nor the sale or delivery thereof avoided, but restitution shall be made only of the money or price for which the same shall be sold.

So where judgment is reversed, the court will award restitution of moneys which have been made in the execution against personal property.<sup>8</sup>

The cases in which restitution will be awarded on a reversal of the judgment, have been already discussed.<sup>9</sup>

## SECTION II.

### EXECUTION AGAINST GOODS AND CHATTELS.—FIERI FACIAS.

*The writ employed.*—The only writ used in this State to reach goods and chattels in the possession of the defendant is the writ of *feri facias*. This writ, like all other writs of execution, must strictly pursue the judgment, and be warranted by it. In substance it is a command to the sheriff or coroner that of the goods and chattels of the party, he cause to be made the sum recovered by the judgment (specifying it according to the form of action), and that he have the money and the writ before the judges of the court from which it issues on the return day thereof.<sup>10</sup>

*Issuing the writ.*—The plaintiff having determined to proceed against the goods and chattels of the defendant, the attorney should direct a *præcipe* for a *feri facias* to the prothonotary of the court where the judgment was obtained, on the receipt of which that officer will prepare the writ.<sup>11</sup> The writ is then taken by the attorney, to be delivered to the sheriff, or other proper officer. Leaving the writ at the office or house of the sheriff, where he usually transacts business, is a sufficient delivery.<sup>12</sup> It is the duty of the officer, upon receiving the writ, to endorse upon it the day of the

<sup>1</sup> *Ibid.*, BURNSIDE, J., citing *Harvey v. Thomas*, 10 Watts 63. If such evidence was not admissible, purchasers at sheriff's sales would not be secure in their titles.

<sup>2</sup> 1 Sm. Laws 60.

<sup>3</sup> *Feger v. Kroh*, 6 Watts 296.

<sup>4</sup> *Burd v. Dansdale*, 2 Binn. 80.

<sup>5</sup> *Heister v. Fortner*, *Ibid.* 47.

<sup>6</sup> *Warder v. Tainter*, 4 Watts 286.

<sup>7</sup> *Arnold v. Gorr*, 1 Rawle 223.

<sup>8</sup> *Williams v. Coward*, 1 Grant 21.

<sup>9</sup> See *ante*, "Error," "Restitution."

<sup>10</sup> See the Form, Smith's Forms 594, pl. 48.

<sup>11</sup> See *ante*, "Endorsement and Form of Writ."

<sup>12</sup> *Miffin v. Will*, 2 Yeates 177.

month, the year, and the hour of the day when it was received.<sup>1</sup> But his omission to do so, does not give priority to a subsequent execution; the actual time may be shown by parol.<sup>2</sup> After the delivery of the writ to the officer, the defendant may pay him the amount of the execution; if he neglect or refuse to do this the officer is bound to proceed.<sup>3</sup> Under the Act of 16th June 1836, the sheriff is bound, 1st, to levy on as much of the defendant's estate as will satisfy debt, interest, and costs, in the discharge of which duty he is not bound to fractional exactness, but is entitled to a liberal latitude; 2d, to make out a schedule of the property levied on; and, 3d, to sell after six days' notice.<sup>4</sup> The same sheriff who begins the execution must end it, though he go out of office before the sale.<sup>5</sup>

It is not necessary for the sheriff, in order to make his levy effectual, that he should first make out an inventory of the chattels; "nor is it necessary, perhaps, in all cases that an inventory should be made out at any time. Neither is it necessary that the sheriff should remove the goods levied on immediately; nor that he put a person, in every case, immediately into the possession of them; a reasonable time must be allowed for this, which may be more or less, to be judged of according to attending circumstances. A levy, however, upon such property cannot be made without the sheriff has it within his power and control, or at least within his view; and if having it so he makes a levy upon it, it will be good if followed up afterwards within a reasonable time, by his taking possession in such manner as to apprise everybody of the fact of its having been taken in execution."<sup>6</sup>

*Levy. Time.*—The latest period for making the levy is the return day of the writ.<sup>7</sup> If not levied until after the return day the writ is spent, and though retained by the officer is dead in his hands.<sup>8</sup> In the case of several executions against the same defendant being delivered to the sheriff, he should execute first the one first delivered,<sup>9</sup> except it be fraudulent, when he ought to execute the other.<sup>10</sup> The usual practice is to sell on all the executions in his hands at the time, leaving the responsibility of distribution to the court.<sup>11</sup> Should he, however, give preference to the last, the proceeding is not void; the property is bound by a sale so made, and the plain-

<sup>1</sup> Act 16th June 1836, § 40, Pamph. L. 768, Purd. Dig. 437, pl. 41. This is required, first, in order to ascertain the relative priority of different writs issued on the same day; and second, in order to fix the time from which the lien of the writ commences as against *bona fide* purchasers of the chattels of defendant. As to the practice where different writs issue from independent jurisdictions, see 5 P. L. J. 160. The inquiry as to the exact moment of delivering writs to the sheriff is confined to writs of *feri facias*, and is not to be extended to writs of foreign attachment: Long's Appeal, 11 Harris 300.

<sup>2</sup> Hale's Appeal, 8 Wright 438.

<sup>3</sup> Act 16th June 1836, § 41, Pamph. L. 768, Purd. Dig. 437, pl. 42.

<sup>4</sup> Earl's Appeal, 1 Harris 483.

<sup>5</sup> 1 Salk. 323.

<sup>6</sup> Wood v. Vanarsdale, 3 Rawle 405, 406.

<sup>7</sup> Bingham on Ex. 242.

<sup>8</sup> Finn v. Commonwealth, 6 Barr 460. See Lentz v. Worthington, 4 Ibid. 153; Commonwealth v. Magee, 8 Ibid. 248; Paxson's Appeal, 13 Wright 195.

<sup>9</sup> 2 Bac. Abr. 721.

<sup>10</sup> 4 East 523.

<sup>11</sup> McDonald v. Todd, 1 Grant 18, per Gibson, J.

tiff in the first execution must take his remedy against the sheriff.<sup>1</sup> Where it does not appear when the levy was made it will be presumed to have been done prior to the return day.<sup>2</sup> The execution of a *fi. fa.* is one act, and not divisible by points of time, *e. g.*, though a seizure be made before the giving a bond of indemnity to the sheriff, and a sale be made afterwards, the execution is considered as made under the writ *after* the giving of the bond.<sup>3</sup>

The sheriff, before the return day, may seize property acquired after the writ was delivered to him; and where property subsequently acquired was levied on under a second writ, and afterwards under the former writ, it was held that the proceeds should be appropriated to the writs according to their priority of delivery to the sheriff.<sup>4</sup>

*Manner of levy.*—The sheriff must take property pointed out to him by the plaintiff in the execution, as belonging to the defendant, if it be his in fact, though it be doubtful then whether it be so or not, if the plaintiff offers to indemnify him. The sheriff takes the risk of a refusal, and is liable, should it appear that the property was in the defendant. But he is not liable at all events; and hence, an offer to indemnify him does not oblige him to sell the property of a third person.<sup>5</sup>

In the execution of the writ of *fi. fa.* the sheriff cannot break open any outer door of the party's dwelling-house;<sup>6</sup> unless in the case of a writ of *habere facias*; but having got entrance, he may in all cases break open an inner door, cupboards, trunks, &c., if necessary;<sup>7</sup> and it has been held that he need not demand entrance at the inner doors, before they are broken open.<sup>8</sup> The rule extends only to the party's dwelling-house, therefore the sheriff may break open the outer door of a barn or outhouse, or store or warehouse, standing separate from the dwelling-house, without a previous demand and refusal of admission;<sup>9</sup> and goods may be taken through the windows, if open.<sup>10</sup> After demand and refusal of entrance, the sheriff may break open the outer door of a dwelling-house belonging to a third person if the defendant or his goods be there;<sup>11</sup> or if the defendant, after being arrested on a *capias*, escape into either his own or another's dwelling-house, the officer will be justified in breaking the outer door to retake him.<sup>12</sup> Also, if after a peaceable entrance at the outer door of the party's dwelling-house the sheriff or his officer be locked in, he may justify breaking open the outer door in order to get out: and the court will probably grant an attachment against the defendant.<sup>13</sup> If the sheriff break an outer door, when he is not justified in doing so, this does not vitiate the execution, but merely renders the sheriff liable to an action of trespass.<sup>14</sup> Where the sheriff enters the house of the defendant, his

<sup>1</sup> 12 Johns. 162; 18 Ibid. 311; McClelland v. Slingluff, 7 W. & S. 135.

<sup>2</sup> Fidler v. Patton, 8 W. & S. 455.

<sup>3</sup> Watmough v. Francis, 7 Barr 212.

<sup>4</sup> Shaner v. Gilmore, 3 W. & S. 438. And see *ante*, 850-1.

<sup>5</sup> Commonwealth v. Watmough, 6 Whart. 140. As to indemnity see *ante* 858, and *post*.

<sup>6</sup> Cro. Eliz. 908; 2 Bac. Abr., "Execution," N.

cution," N.

<sup>7</sup> 2 Show. 87; Cowp. 1.

<sup>8</sup> 4 Taunt. 619.

<sup>9</sup> 1 Sid. 189; 16 Johns. 287.

<sup>10</sup> Bingh. on Ex. 244.

<sup>11</sup> 5 Co. 93, a.; 1 Foster 319.

<sup>12</sup> 6 Mod. 105.

<sup>13</sup> Cro. Jac. 555; Palm. 52.

<sup>14</sup> 1 Arch. Pr. 261.

justification does not depend on his finding or not finding property. But it is otherwise where he enters a stranger's house, in which case he is not justified, unless it turn out that the defendant had goods therein liable to execution.<sup>1</sup> No settled rule appears to exist as to the length of time the sheriff should continue in the house of the defendant or a stranger upon a *fi. fa.*; he ought not, however, to remain there unpermitted longer than is necessary for the service of his process.<sup>2</sup>

A levy cannot be made on personal property without having the goods levied on in actual manucaption or control.<sup>3</sup> It is essential that the property levied on be in the power or within the view of the sheriff at the time it was made; a levy is an assertion of title by the sheriff, and should be public, open, and unequivocal.<sup>4</sup> Therefore where the chattel levied on was at the time of the levy ten miles off, and was not seen by the sheriff until after the return day, the levy was invalid as against an actual levy subsequently made under another writ.<sup>5</sup> So merely proclaiming a levy on goods locked up in a store, and not in view, is not sufficient; the store should be broken open, the goods seized, and an inventory taken.<sup>6</sup> In England the officer generally enters upon the premises in which the defendant's goods are, and leaves one of his assistants in possession of them.<sup>7</sup> He may levy on part of the goods in the name of the whole.<sup>8</sup> But it was doubted whether a levy on goods in a store in the lower part of a house amounted to a levy on furniture in the upper part of the same house.<sup>9</sup> But actual seizure may be dispensed with for the defendant's accommodation, and the officer will have a constructive possession, which is good as between him and the defendant, but not as against other creditors.<sup>10</sup> In order to be valid against other creditors, this species of levy must be followed up within a reasonable time by the actual taking of possession.<sup>11</sup> And so the defendant may retain possession for the officer, becoming thereby *quoad hoc* his servant, and answerable to him in trespass *vi et armis*, should he retain or remove the goods after such levy and arrangement to hold for the officer.<sup>12</sup> It is a frequent practice for the sheriff to take security for the forthcoming of the goods, leaving them in the defendant's keeping, but this is at his own risk. The sheriff need not take the property into actual custody; it is enough if it be forthcoming, to answer the exigencies of the writ.<sup>13</sup> The receipt of a second *fi. fa.* amounts from the time it is endorsed by the sheriff to a reseizure of the goods, on which a prior levy has

<sup>1</sup> 5 Taunt. 769, 770.

<sup>2</sup> Tidd 1049.

<sup>3</sup> Welsh v. Bell, 8 Casey 12; Wood v. Vanarsdale, 3 Rawle 405; Trovillo v. Tilford, 6 Watts 468; Linton v. Commonwealth, 10 Wright 294.

<sup>4</sup> Duncan's Appeal, 1 Wright 500; Lowry v. Coulter, 9 Barr 349.

<sup>5</sup> Duncan's Appeal, 1 Wright 500.

<sup>6</sup> 16 Johns. 287.

<sup>7</sup> 1 M. & S. 711.

<sup>8</sup> Lewis v. Smith, 2 S. & R. 144.

<sup>9</sup> Burchard v. Rees, 1 Whart. 377.

<sup>10</sup> Trovillo v. Tilford, 6 Watts 468; Lowry v. Coulter, 9 Barr 349; Com. Ins. Co. v. Berger, 6 Wright 285.

<sup>11</sup> Lowry v. Coulter, 9 Barr 349; Wood v. Vanarsdale, 3 Rawle 402.

<sup>12</sup> Trovillo v. Tilford, 6 Watts 468.

<sup>13</sup> Dorrance v. Commonwealth, 1 Harris 160.

been made, and thenceforth they are in custody on all the writs.<sup>1</sup> The endorsement itself amounts to such reseizure.<sup>2</sup>

Where one constable levies on goods, another cannot, under a second execution, take the same goods out of his hands and sell them, though the first execution be on a fraudulent judgment; the right to the proceeds must be determined by law.<sup>3</sup>

*Schedule, or inventory.*—The officer, in justice to the plaintiff, the defendant, and subsequent execution-creditors, should make a *schedule* of the property levied upon. He is not bound to exactness, but the levy or schedule should be sufficiently descriptive to denote the property levied upon, and to give notice to subsequent execution-creditors.<sup>4</sup> It need not be made in the first instance.<sup>5</sup> The property may be designated in the body of the return, or by reference to the schedule attached thereto. And it is said that such designation is requisite to render the levy good.<sup>6</sup> If he have several writs in his hands at the same time, he may endorse upon each a list of the goods levied on, but this is not necessary, and the practice is to make the endorsement or attach the schedule to one writ, and refer to this in the returns on the others.<sup>7</sup> But an omission to do either cannot be supplied by other proof; hence, if he return a levy and schedule under a second execution, the prior writ having been returned without a levy or schedule, he must apply the money to the second writ, leaving the plaintiff on the first to his remedy against him.<sup>8</sup> It is not competent to prove by parol a levy made in writing without first proving its loss.<sup>9</sup> When the sheriff levies on a specific article, or articles, naming them, without more, he will be confined to his levy; as, for example, where he levies on a horse, he will not be permitted to sell a cow, or other article of property; but not so where words are added which plainly indicate his intention to include other property, although not specifically named or enumerated.<sup>10</sup> And a levy on certain enumerated articles, and all the defendant's property not exempted by law, will embrace all the property then possessed or afterwards acquired by defendant, though not enumerated; and evidence that part of the unenumerated goods sold were acquired after the levy, though before the return day of the writ, will not be received for the purpose of letting in on the fund a subsequent *fi. fa.* under which the sheriff had levied on such goods specifically.<sup>11</sup>

Though as between successive execution-creditors, it is essential that the sheriff designate the property levied on either in the body of his return, or by reference to the accompanying schedule, yet as to all other persons a valid levy may be made without either endorse-

<sup>1</sup> *Watmough v. Francis*, 7 Barr 206; 17 Johns. 16.

<sup>2</sup> *Watmough v. Francis*, 7 Barr 206.

<sup>3</sup> *Winegardner v. Wafer*, 3 Harris 144.

<sup>4</sup> *Earl's Appeal*, 1 Harris 483, 1 W. C. C. R. 29.

<sup>5</sup> *Wood v. Vanarsdale*, 3 Rawle 401.

<sup>6</sup> *Barnes v. Billington*, 1 W. C. C. R. 29.

<sup>7</sup> *McCormick v. Miller*, 3 Pa. R. 230.

<sup>8</sup> *McClelland v. Slingluff*, 7 W. & S. 135.

<sup>9</sup> *Bank v. Fordyce*, 1 Barr 454.

<sup>10</sup> *Wilson's Appeal*, 1 Harris 428, per ROGERS, J.

<sup>11</sup> *Ibid.*, citing *Shaffner v. Gilmore*, 3 W. & S. 438, and explaining *McClelland v. Slingluff*, 7 *Ibid.* 134. And see *ante*, 883.

ment or schedule; the levy is a seizure, and the endorsement only evidence of it, and not exclusive evidence, except in favor of subsequent execution-creditors or purchasers.<sup>1</sup>

In contemplation of law, unless it appears to be clearly otherwise, the sheriff is deemed to have seized under the second writ the same property that was seized under the first, and not merely the surplus, from the time the second writ came into his hands, or at any rate from the time he endorses the seizure.<sup>2</sup>

When the inventory is erroneous the sheriff may have leave to amend it; or a party in interest may compel him to do so, or fix his liability by filing exceptions to it.<sup>3</sup>

The refusal of the court to set aside a levy is not ground for a writ of error.<sup>4</sup>

*Effect of a levy.*—The seizure of the goods vests the possession in the sheriff, and he has such a special property in them that he may maintain trespass or trover against the defendant or a third person for taking them away.<sup>5</sup> In such action the defendant cannot set up that the chattel was his property: whatever his title he could not assert it while the chattel was in the custody of the law.<sup>6</sup> But until sold, the property of the judgment-debtor is not wholly divested; it remains in him subject to the levy, and is at his disposal burdened with the encumbrance.<sup>7</sup> The officer, under the authority of the law, is invested with full power to sell and transfer the absolute property in the goods, and this is the full extent of all that belongs to him.<sup>8</sup>

The sheriff is answerable to the plaintiff for the value of the goods seized, or which might have been seized under the *fi. fa.*,<sup>9</sup> but not beyond that value;<sup>10</sup> and in the case of his refusal to sell, his liability will be measured by the value of the goods or the amount of

<sup>1</sup> Weidensaul v. Reynolds, 13 Wright 73. See Fittler v. Patton, 8 W. & S. 455.

<sup>2</sup> Watmough v. Francis, 7 Barr 214. ROGERS, J.

<sup>3</sup> Parmentier v. Stewart, Leeds v. Stewart. D. C., Feb. 24th 1849. Why the sheriff should not be permitted to amend his inventory filed. *Per curiam*. The inventory filed is defective. It merely states a lot of lumber. In cases under this Act of Assembly, the operation of which is to relieve the sheriff from so heavy an amount of responsibility, it is the inclination of the court to require from the sheriff a particular inventory of his levy. It should be as detailed as possible—as much so as a merchant's account of stock. He ought not, however, to be permitted to extend his inventory to the prejudice of the surety by introducing other articles not strictly within the general terms he has employed at first. Sheriff allowed to amend by specifying the particulars of the lot of lumber mentioned in his

inventory.

<sup>4</sup> Lents v. Witte. D. C., Feb. 24th 1849. Exceptions to sheriff's inventory. *Per curiam*. A very proper practice has been adopted in this case. The filing of exceptions in analogy to other cases will suspend the rule discharging the sheriff until he has filed a sufficient inventory, or procured a decision of the court upon the subject. In this case, the inventory is clearly insufficient. Exceptions sustained.

<sup>5</sup> Lewis v. Amor, 3 Barr 460.

<sup>6</sup> 2 Saund. 47, ca. 5; Lytle v. Mehaffey, 8 Watts 275; Tower v. Barrington, Bright. R. 253; Welsh v. Bell, 8 Casey 12; Weidensaul v. Reynolds, 13 Wright 73.

<sup>7</sup> Weidensaul v. Reynolds, 13 Wright 73.

<sup>8</sup> Towar v. Barrington, Bright. R. 253.

<sup>9</sup> Lytle v. Mehaffey, 8 Watts 275.

<sup>10</sup> Taylor's Appeal, 1 Barr 392.

<sup>11</sup> Ibid.

the execution, whichever is least.<sup>1</sup> He is absolutely liable for the forthcoming of the goods, unless deprived of them by the act of God, sudden accident, or the public enemy: hence, when the goods levied on were sufficient to pay the debt, and a part were stolen between the levy and sale, so that the money could not be made, the sheriff is liable for the deficiency.<sup>2</sup>

And a seizure is a discharge of the debtor and a satisfaction of the judgment, if the value of the goods equals the amount of the debt, whether they be sold or not.<sup>3</sup> But this must be understood to be so only *sub modo* and in a qualified sense.<sup>4</sup> Thus, it would not be prudent or safe for a surety to commence a suit against his principal to recover the debt from him, merely because the surety's goods had been taken in execution for it, without any sale having been made of them, or allowing a proper lapse of time for that purpose.<sup>5</sup> And where two are jointly and severally bound, and execution is had against one of them, and his goods are seized but not sold, this cannot be pleaded in an action of debt against the other obligor, because it is no actual satisfaction.<sup>6</sup>

A clause in a policy of insurance, that it should "cease at and from the time" the premises "shall be levied on or taken into possession or custody, under any proceeding at law or in equity," is to be construed as meaning an actual levy and change of possession under it; a mere notice of levy given by the officer to defendant, without his taking the goods insured into possession or custody, though good as a levy, will not avoid the policy.<sup>7</sup>

The effect of a levy as regards satisfaction may be considered here in two aspects: 1st, in relation to the debtor; and 2d, in relation to his creditors: the effect of the levy in respect to its lien has been already explained.<sup>8</sup>

*As regards the debtor.*—When the sheriff seizes sufficient property of the defendant, he cannot make a second levy;<sup>9</sup> the debtor is discharged from the judgment, and the plaintiff must look to the sheriff for his money;<sup>10</sup> and the taking a bond for the money has the same effect;<sup>11</sup> and the debtor may plead the discharge in bar to

<sup>1</sup> *Hamner v. Griffith's Administrator*, 1 Grant 193. This seems a correct rule for the measure of damages in other cases. See *ante*, p. 861-3, "Liability of Sheriff to Plaintiff."

<sup>2</sup> *Hartleib v. McLane's Administrator*, 8 Wright 510.

<sup>3</sup> *Cathcart's Appeal*, 1 Harris 421; *Cummins's Appeal*, 9 W. & S. 73; *Dauids v. Harris*, 9 Barr 501; 2 Saund. 47; 6 Mod. 292; *Nagle v. Stroh*, 4 Watts 124; *Lyon v. Hampton*, 8 Harris 46.

<sup>4</sup> *Lytle v. Mehaffey*, 8 Watts 275. It is not at all the case in a levy on real estate, for there the execution-plaintiff may never receive the money at all, it being distributed to prior lien-creditors: *Ibid.*

<sup>5</sup> *Ibid.*, per KENNEDY, J.

<sup>6</sup> *Ld. Raym.* 1072; *Sicard v. Peterson*, 3 S. & R. 468.

<sup>7</sup> *Insurance Co. v. Berger*, 6 Wright 285.

<sup>8</sup> See *ante*, 849-51.

<sup>9</sup> *Hunt v. Breeding*, 12 S. & R. 41; *Dean v. Patton*, 13 *Ibid.* 344; 12 Johns. 207; *Nagle v. Stroh*, 4 Watts 124; *Freeman v. Caldwell*, 10 *Ibid.* 9; *Boas v. Updegrove*, 5 Barr 519; *Cummins's Appeal*, 9 W. & S. 73; *Dauids v. Harris*, 9 Barr 501; *Cathcart's Appeal*, 1 Harris 421; *Lyon v. Hampton*, 8 *Ibid.* 46.

<sup>10</sup> 4 Johns. Ch. R. 228.

<sup>11</sup> *Boas v. Updegrove*, 5 Barr 519, citing *Freeman v. Caldwell*, 10 Watts 9.

an action of debt or *scire facias* upon the judgment,<sup>1</sup> being absolutely discharged to the extent of the levy whether the sheriff can sell the goods or return the writ or not;<sup>2</sup> or even although they afterwards be rescued from him.<sup>3</sup> If the officer deliver the goods to a third person on his giving a receipt to return them or pay the amount of the execution, he cannot afterwards take other goods of the defendant in execution; and in such case it is immaterial whether the property originally taken were sufficient to satisfy the execution or not, or that the officer had been unable to recover anything on his receipt.<sup>4</sup>

But as between plaintiff and defendant a levy, afterwards released, is not an extinguishment of the debt.<sup>5</sup>

There may be a question whether the value of the goods is sufficient. By our practice, which differs in this particular from the English, a *general* return of goods levied, whereby it does not clearly appear that they were sufficient, does not operate to discharge the defendant and deprive the creditor of all further remedy except against the sheriff: in such case, if the sheriff pay the fair amount of the sales to the plaintiff it is all that is required of him, and the plaintiff may issue an *alias fi. fa.* or *ca. sa.* for the residue without application to the court. Therefore, where a *fi. fa.* was returned, levied on grain in the barn and in the ground, household furniture, &c. (described and left at the plaintiff's risk), it was held not to be evidence that the judgment was completely satisfied, so as to make an *alias* for the residue void.<sup>6</sup> But a return to a *fi. fa.* levied on certain specified articles, with all the defendant's personal estate, is *prima facie* evidence of a levy to the value of the whole debt.<sup>7</sup> And now the sheriff's return that he has levied the debtor's goods without specifying the value, is *prima facie* evidence that the value was sufficient to pay the debt.<sup>8</sup>

The rule applies though the title of the purchaser of the goods at the sheriff's sale be defeated in an action of replevin; for there is no warranty in judicial sales, and it makes no difference that the plaintiff became the purchaser; he is concluded by the sheriff's return, and cannot renew his execution.<sup>9</sup>

The rule as to the discharge of the debtor does not apply, where the goods have been left in his continued possession, and he has been permitted to use them as his own.<sup>10</sup> Nor where the goods were released by the plaintiff, the judgment remaining unpaid.<sup>11</sup> Accordingly, the return of "levied" on personal property, where the property had been restored to the defendant on a forthcoming bond, and not delivered back to the sheriff, does not preclude the plaintiff from

<sup>1</sup> 2 Bac. Abr. 720.

<sup>2</sup> 2 Mod. 214.

<sup>3</sup> 2 Saund. 343.

<sup>4</sup> 12 Johns. 207.

<sup>5</sup> Duncan v. Harris, 17 S. & R. 436.

<sup>6</sup> Little v. Lessee of Delancey, 5 Binn. 266, 272.

<sup>7</sup> Newlin v. Palmer, 11 S. & R. 99. At least so far as to throw the burden of proving the value of the goods upon

the surety of the sheriff, in an action for refusing to sell: Ibid.

<sup>8</sup> Beale v. Commonwealth, 7 Watts 187.

<sup>9</sup> Freeman v. Caldwell, 10 Watts 9. See Boas v. Updegrove, 5 Barr 519.

<sup>10</sup> Cummins's Appeal, 9 W. & S. 73; Davids v. Harris, 9 Barr 501; Cathcart's Appeal, 1 Harris 421.

<sup>11</sup> Duncan v. Harris, 17 S. & R. 436.



resorting to the proceeds of defendant's lands which are in court for distribution.<sup>1</sup> So an execution issued by a justice, and returned "levied but not sold for want of time," an *alias* stayed, and a *pluries* issued nine years afterwards, returned "no goods," are no evidence for defendant that the debt is paid: here there is no evidence or any pretence of evidence, that the plaintiff had any advantage or benefit from the levy; the goods were not removed nor disturbed; and in such case there is no legal presumption that the judgment is satisfied.<sup>2</sup>

If the levy be released by the plaintiff, and is lost to the defendant, it is *pro tanto* a satisfaction; though it is otherwise if the release was at the defendant's request.<sup>3</sup>

After a levy on goods the plaintiff cannot discharge them, and continue his judgment in force as to the land of defendant.<sup>4</sup> But a revocation of a levy as to the goods of one surety does not discharge his co-surety.<sup>5</sup>

As regards other creditors of the execution-debtor, the seizure of goods in execution to the amount of the debt is a discharge of the judgment whether the goods be sold or not, except where the plaintiff is deprived of the fruit of his levy without any fault of his own.<sup>6</sup> So, if after levy the goods are left in the hands of the debtor who disposes of them, this is a satisfaction of the execution to the amount of the goods disposed of.<sup>7</sup> And if the sheriff returns that he has levied and left the goods in the hands of the debtor, the judgment must be treated as having been at one time actually satisfied. Whether it might be restored to its former incidents by agreement of the parties as between themselves is a question; but it certainly could not be restored so as to deprive third persons of any advantage acquired by such return.<sup>8</sup> Yet a levy on personal property stayed by order of plaintiff, where there is no proof of collusion between the plaintiff and defendant, and the property, being left in the possession of defendant and used by him as before the levy, was either sold under proceedings by subsequent creditors, or consumed and disposed of by the defendant himself, does not amount to a satisfaction, nor does it operate to postpone the plaintiff to junior judgments; but the creditors are entitled to the proceeds of a judicial sale of defendant's real estate according to the seniority of their liens.<sup>9</sup> So, the issuing of a second writ which is withdrawn

<sup>1</sup> Taylor's Appeal, 1 Barr 392. And see Morrison v. Hoffman, Ibid. 13.

<sup>2</sup> Davids v. Harris, 9 Barr 501.

<sup>3</sup> Porter v. Boone, 1 W. & S. 251. See Duncan v. Harris, 17 S. & R. 436; Dean v. Patton, 13 Ibid. 342.

<sup>4</sup> Hunt v. Bredding, 12 S. & R. 37; U. S. v. Dashiell, 3 Wall. 697.

<sup>5</sup> Whitehill v. Wilson, 3 Pa. R. 405.

<sup>6</sup> Lyon v. Hampton, 8 Harris 46. See Duncan v. Harris, 17 S. & R. 436.

<sup>7</sup> Truitt v. Ludwig, 1 Casey 145.

<sup>8</sup> Gratz v. Bayard, 11 S. & R. 41; Dean v. Patton, 13 Ibid. 342, 343.

<sup>9</sup> Morrison v. Hoffman, 1 Barr 13;

Cathcart's Appeal, 1 Harris 416; Campbell's Appeal, 8 Casey 88. See McCoy v. Reed, 5 Watts 300; Cummins's Appeal, 9 W. & S. 73; Earl's Appeal, 1 Harris 483. And *contra*, Hunt v. Bredding, 12 S. & R. 37. But nothing more was decided in Hunt v. Bredding, than that an execution-creditor whose levy has kept other creditors at bay, shall not abandon it and assign his judgment for the consideration of payment, as an existing lien on the land: Taylor's Appeal, 1 Barr 393.

before any proceedings are had under it is not an abandonment of the preceding levy.<sup>1</sup> Nor is a levy such a satisfaction of the debt as to prevent an attachment by a creditor of the plaintiff in the execution.<sup>2</sup>

The effect of the levy upon the liability of the officer executing the writ has been already considered.<sup>3</sup>

*Custody of the goods.*—As the goods levied on are at the risk of the officer, he must keep them safely till the sale. It is not customary to remove them provided the officer be secured as to their production when demanded; and the lien of the levy has always been held to continue, although the chattels were not removed under the *fi. fa.* unless fraud be proved.<sup>4</sup> But a purchaser, without notice of the levy, will hold the goods discharged from the lien of the execution.<sup>5</sup> In England, however, the practice is to remove the goods, and the fact that they are not removed is a badge of fraud, so as to render them liable to a second execution, or to pass into the hands of a purchaser discharged from the lien of the execution-creditor, and the only exception to this rule in this State is the case of household furniture.<sup>6</sup> And it has been doubted whether even this class of goods, however valuable, is to be exempted without limitation from the general rule.<sup>7</sup>

If the sheriff without legal authority withdraws from and surrenders the possession of the goods levied on, and makes return to that effect on the writ, the lien of the execution on the goods is gone, and the plaintiff has no claim on the proceeds of their sale under a subsequent *fi. fa.*<sup>8</sup>

It is a frequent practice for the sheriff to take security for the forthcoming of the goods, leaving them in the defendant's keeping, but this is at his own risk. But as against a vendee or a subsequent execution the lien of the *fi. fa.* is gone, if the sheriff having taken a bond from the defendant conditioned for the return of the property, left the goods in the defendant's hands for nearly a year, when defendant sold them.<sup>9</sup> But where there has been no excessive delay, the taking of a forthcoming bond by the sheriff for the delivery of the goods at the day of sale, is not a dissolution of the levy any more than is the taking a bond for stay of execution; the creditor may press his lien, or his bond, or both at the same time.<sup>10</sup> The effect of delay in prosecuting the execution will be considered hereafter. A surety in a forthcoming bond is discharged, if, after the day specified in the bond for the delivery of the goods to the sheriff, the original award on which the execution issued was referred to

<sup>1</sup> Ingham v. Snyder, 1 Whart. 116.

<sup>2</sup> Winternitz's Appeal, 4 Wright 490.

<sup>3</sup> Ante, p. 861, *et seq.*

<sup>4</sup> Cox v. McDougal, 2 Yeates 434; Perit v. Wallis, Ibid. 524; Levy v. Wallis, 4 Dall. 167; Waters's Executors v. McClellan, Ibid. 208; and the notes to these two cases. See also Huber v. Schnell, 1 Browne 16; Graver v. Hitchcock, 2 Ibid. 333; Little v. Lessee of Delancey, 5 Binn. 269; Keyer's Appeal, 1 Harris 412.

<sup>5</sup> Chancellor v. Phillips, 4 Dall. 213.

<sup>6</sup> Lewis v. Smith, 2 S. & R. 142; Cowden v. Brady, 8 Ibid. 510.

<sup>7</sup> Commonwealth v. Stremback, 3 Rawle 341, per Rogers, J.

<sup>8</sup> Commonwealth v. Contner, 6 Harris 439.

<sup>9</sup> Snyder v. Beam, 1 Browne 366.

<sup>10</sup> Hastings v. Quigley, 4 P. L. J. 220; Lantz v. Worthington, 4 Barr 155, citing Sedgwick's Appeal, 7 W. & S. 260.

the arbitrators on exceptions, and confirmed under an agreement that three months' stay should be given: the execution being discharged by such agreement, the bail is also discharged.<sup>1</sup>

Where the sheriff instead of removing the goods takes from a stranger to the writ a writing in the nature of a forthcoming bond, that he would deliver the articles levied to the sheriff at any time when demanded, or pay the debt, interest, and costs in the execution; the party when afterwards sued on this writing cannot set up in excuse of his non-performance, that the goods were his own and not the property of the defendant in the execution.<sup>2</sup>

When the officer leaves the goods without having made an inventory, and without leaving any one in possession on his behalf, and they are distrained for rent, and sold without notice of the prior levy, the lien of the *fi. fa.* is gone, and the officer cannot re seize the goods in the possession of the purchaser; if he does so and sells them, his vendee takes no title.<sup>3</sup>

*Consequences of leaving the goods with defendant.*—The consequences of leaving the goods levied upon in the custody of the defendant may affect the defendant, the officer, or the plaintiff.

*As to the defendant,* we have seen that if the goods were left in his custody, and the plaintiff thereby and without any fault of his own has failed to reap the fruits of his levy, the presumption of satisfaction is overcome.<sup>4</sup>

*As relates to the officer,* his duty being to remove the goods, it is at his own risk that they are left with defendant, and if they are eloiigned he is liable as in other cases of misconduct. The plaintiff, therefore, is not liable for the wages of a watchman hired by the sheriff to take charge of the goods: a direction to the sheriff by the attorney of the plaintiff, to put a watchman in charge, is not evidence from which to imply a promise to pay for his services; such direction was simply a notice that the sheriff would be held responsible if he suffered the goods to remain in possession of the debtor and they should be lost.<sup>5</sup> Nor can he deduct from the proceeds of sale the expenses of watchmen employed by him at defendant's request, in consequence of a delay in the sale at the instance of defendant.<sup>6</sup> An endorsement "levy at the risk of the plaintiff," is understood to mean nothing more than that the property until sale may be left with the defendant at the risk of the plaintiff, and not at the risk of the sheriff; that if the property is not produced on the day of sale, so far as regards the plaintiff the sheriff is released; and further, perhaps, as an agreement to indemnify the sheriff for a levy on the goods of a stranger.<sup>7</sup>

*As regards the plaintiff,* the consequences of leaving the goods in defendant's custody may be most serious, especially if his direction to that effect be accompanied with instructions to the officer to delay or postpone the execution of the writ. Although the mere

<sup>1</sup> Blaine v. Hubbard, 4 Barr 183.

<sup>2</sup> Nagle v. Stroh, 4 Watts 124.

<sup>3</sup> McHugh v. Maloney, D. C. Phila.,

4 Phila. Rep. 59.

<sup>4</sup> See ante, 888-9.

<sup>5</sup> Deal v. Tower, D. C. Phila., 1 Phila. Rep. 268.

<sup>6</sup> Fitch's Appeal, 10 Barr 461.

<sup>7</sup> Keyser's Appeal, 1 Harris 409, per ROGERS, J.

fact that household goods are permitted to remain in the defendant's custody is not here, as in England, a badge of fraud,<sup>1</sup> yet, as there is no certain rule how long they may with safety to the plaintiff be permitted to remain in defendant's possession, the cases having varied from one day to upwards of two years,<sup>2</sup> it is attended with hazard. And now it would hardly be safe for creditors to permit the levy to remain, without sale of the goods, or some person having them in charge, so long a time as would seem to be authorized by the earlier cases.<sup>3</sup> If an execution-creditor after levy leaves the goods in the hands of the debtor, who disposes of them, this is a satisfaction of his execution to the amount of the goods so disposed of.<sup>4</sup> It is in contravention of the law to permit the possession and control of the property to remain after the levy as before, it being not only fraud in fact but fraud in law, and though there is no unnecessary delay in making the sale, and no order to delay it, the execution will be postponed.<sup>5</sup> Goods levied on should in a reasonable time thereafter be taken possession of by the officer in such a manner as to apprise everybody that they have been taken in execution.<sup>6</sup> And, if suffering the goods to remain in the possession of the debtor has given him a false credit, the creditor loses his lien.<sup>7</sup>

In the Circuit Court of the United States, it has been ruled generally that other executions will be preferred, if on a *fi. fa.* the property be left with the debtor.<sup>8</sup> In the same court it was decided that where goods are levied on by virtue of a *fi. fa.* and left with the debtor *by order of the plaintiff*, the effect of the levy is suspended until a countermand; and a second execution levied on the same goods, before such countermand, and regularly proceeded in, will have a preference.<sup>9</sup> A suspension for one day is sufficient to give a preference to an intervening execution, and the length of time during which the levy is suspended is immaterial.<sup>10</sup> It has even been said that the lien of an execution levied on goods may be lost by the slightest negligence in pursuing it.<sup>11</sup>

The cases ruling the levy to have been lost as to junior *fi. fas.*, by staying proceedings, are instances of indefinite stays, and where the executions appeared to be designed as covins, or to create liens separate from the possession; where, however, the sale is not *postponed*, but merely adjourned before the return day, for a few days, a measure not inconsistent with making the money on the same writ, and creating no presumption that anything else was intended, the lien will not be lost. If adjourned until after the return day, it would be equivalent to an indefinite postponement, and therefore

<sup>1</sup> Commonwealth v. Stremback, 3 Rawle 341, per ROGERS, J.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Truitt v. Ludwig, 1 Casey 145.

<sup>5</sup> Parys's Appeal, 5 Wright 273. In this case the sheriff's sale was made eight days after levy; but the plaintiff's offence was aggravated by permitting the private sale of the goods

in the interval.

<sup>6</sup> Wood v. Vanarsdale, 3 Rawle 401.

<sup>7</sup> Knox v. Summers, 4 Yeates 477.

<sup>8</sup> 1 W. C. C. R. 29. See also United States v. Conyngham, 4 Dallas 358.

<sup>9</sup> 3 W. C. C. R. 60.

<sup>10</sup> Ibid. See a commentary on this decision in Brackenridge's L. M. p. 506.

<sup>11</sup> Cowden v. Brady, 8 S. & R. 510.

fraudulent; but where the creditor really means to obtain his money under the writ, it would be unreasonable to interfere with his direction of it.<sup>1</sup>

*Interference of the plaintiff with the process* is often combined with allowing the goods to remain in the custody of the defendant, and will, especially in such combination, cause the plaintiff to lose his priority. An execution is intended not to secure but to enforce payment of the debt.<sup>2</sup> And a levy made with any other than a *bona fide* purpose of making the money under it is fraudulent as against subsequent executions.<sup>3</sup> If then, the plaintiff undertakes to pervert the writ and make use of it for the purpose of keeping other creditors at bay, he commits a fraud upon such creditors which will have the effect of postponing his execution to theirs. We have already seen that as regards household furniture, the mere fact of the goods having been left in defendant's possession does not constitute a fraud. But even as to this class of goods, if that fact be accompanied by a long and unreasonable delay in effecting a sale, though without the plaintiff having instructed the officer to postpone the sale, it will perhaps cause the lien of the levy to be postponed in favor of subsequent execution-creditors.<sup>4</sup> It has even been said that the lien may be lost by the slightest negligence in pursuing the execution.<sup>5</sup> And the latitude does not extend to merchandise taken in execution.<sup>6</sup> And withdrawing the officer left in charge of the goods, suffering the debtor to go on in his business as usual, amounts to a relinquishment of the execution as against other execution-creditors.<sup>7</sup>

If the plaintiff, however, gives positive directions to the officer to stay proceedings, manifestly intending thereby to wield the priority which he has obtained for the double purpose of securing his own debt and protecting the defendant's goods against the just claims of more tardy creditors, he commits a fraud in law which will cause his rights to be forfeited.<sup>8</sup> And any arrangement with the defendant, or other conduct of the plaintiff evincing his intention not to have a sale of the goods, will postpone his writ: notice to the sheriff to stay proceedings is not necessary to operate a postponement.<sup>9</sup>

Thus executions on a store have been postponed where the plaintiff directed the store not to be closed, and the sales went on as usual,

<sup>1</sup> Lantz v. Worthington, 4 Barr 155.

<sup>2</sup> Truitt v. Ludwig, 1 Casey 145.

<sup>3</sup> Weir v. Hale, 3 W. & S. 285.

<sup>4</sup> Lewis v. Smith, 2 S. & R. 142; Cowden v. Brady, 8 Ibid. 510; Commonwealth v. Stremback, 3 Rawle 341.

<sup>5</sup> Cowden v. Brady, 8 S. & R. 510. It would seem that the postponement of the sale of goods taken under a distress, for a short time, at the request of the tenant, does not postpone the distress to an intervening execution: Kline v. Lukens, D. C. Phila., 4 Phila. Rep. 296.

<sup>6</sup> Chancellor v. Phillips, 4 Dallas 213.

<sup>7</sup> Guardians v. Lawrence, 4 Yeates 194.

<sup>8</sup> Eberle v. Mayer, 1 Rawle 366; Mentz v. Hamman, 5 Whart. 153; Smith's Appeal, 2 Barr 331; Hickman v. Caldwell, 4 Rawle 376; Flick v. Troxell, 7 W. & S. 65; Lowry v. Coulter, 9 Barr 349; Earl's Appeal, 1 Harris 483; Lyon v. Hampton, 8 Ibid. 46; Truitt v. Ludwig, 1 Casey 145; Fletcher's Appeal, S. Ct., 17 Leg. Int. 300; Freeburger's Appeal, 4 Wright 244.

<sup>9</sup> Weir v. Hale, 3 W. & S. 285.

the proceeds being paid to plaintiff,<sup>1</sup> and this though the first execution was not for security merely, and there was no unnecessary delay in executing it.<sup>2</sup> So if the writ be stayed indefinitely under an agreement which enabled the defendant to comply with a sale already made by him of the goods, and his vendees thus obtained credit, the fact of the levy being unknown to their creditors.<sup>3</sup> So a direction to the sheriff to stay proceedings till further orders, will postpone the writ in favor of junior executions, if the object of the arrangement was a security for the debt.<sup>4</sup> So if the defendant, acting for the plaintiff, direct the sheriff to proceed no further, the execution is fraudulent as to creditors.<sup>5</sup> The principle is that to levy with directions to proceed no further, can be referred to no object but the creation of a lien which the law does not tolerate.<sup>6</sup> So where a direction was given "not to proceed till further orders," and afterwards "to make a levy but not to sell," and subsequently by arrangement the debtor was allowed access to the goods by giving him the keys of the shop, this is sufficient evidence that the execution was not issued to collect the debt, but for another purpose, which was not legitimate nor protected by the law.<sup>7</sup> An endorsement "levy at the risk of the plaintiff," does not amount to a direct or implied stay of the proceedings, nor is it understood without more that the execution is put in the hands of the sheriff for security, and not for sale.<sup>8</sup>

So where after levy the creditor takes a bond with security for the amount of the debt, conditioned for its payment by instalments at future periods, and that the goods levied on shall not be removed without consent of the sheriff, and then stays proceedings on the execution, leaving the debtor in possession of the goods and permitting him to buy, sell, and do business with them as before, the lien of the levy is postponed in favor of a subsequent writ, under which the goods were seized before actual possession taken under the first execution.<sup>9</sup> By accepting such bond, and staying execution, the plaintiff parts with the right of seizing the goods before the maturity of the debt under the new contract.<sup>10</sup> An *alias fi. fa.* by the first execution-creditor, placed in the sheriff's hands before the first instalment on his bond becomes due, and after the goods have been seized on a subsequent writ, will not revive the lien of the first execution, or create a new lien having priority over the subsequent execution.<sup>11</sup>

But the plaintiff's mere sufferance of procrastination by the officer

<sup>1</sup> Keyser's Appeal, 1 Harris 409; Bingham v. Young, 10 Barr 395; Parys' Appeal, 5 Wright 273.

<sup>2</sup> Parys' Appeal, 5 Wright 273.

<sup>3</sup> McClure v. Ege, 7 Watts 74, reviewing all the decisions and showing the change of the law on this subject since Levy v. Wallis, 4 Dallas 168, and citing Commonwealth v. Stremback, 3 Rawle 343.

<sup>4</sup> Eberle v. Mayer, 1 Rawle 366; Commonwealth v. Stremback, 3 Ibid. 341.

<sup>5</sup> Lowry v. Coulter, 9 Barr 349.

<sup>6</sup> Hickman v. Caldwell, 4 Rawle 376. See Stewart v. Stocker, 13 S. & R. 204, 345; Corlies v. Stanbridge, 5 Rawle 286.

<sup>7</sup> Freeburger's Appeal, 4 Wright 244.

<sup>8</sup> Keyser's Appeal, 1 Harris 409.

<sup>9</sup> Truitt v. Ludwig, 1 Casey 145.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

is not fraudulent *per se*,<sup>1</sup> and the plaintiff is to be postponed only where he has directed the sheriff not to proceed.<sup>2</sup> And it has been said that an execution cannot be postponed under any circumstances for the default of the officer.<sup>3</sup> Yet where an execution was issued more than a month before the return day, and levied on certain enumerated articles, "and all the rest of defendant's goods and chattels," and no further proceedings on the execution took place for two months, no inventory being returned, the defendant being permitted to carry on his business as usual, selling some of the goods and acquiring others, and no direction given to the sheriff to proceed and sell, it was decided that the execution was postponed, whether the delay were owing to the direction or permission of the plaintiff, or to the default of the officer.<sup>4</sup> It would seem, therefore, that great and unreasonable delay in proceeding will have the same effect as a positive direction from the plaintiff not to proceed.<sup>5</sup>

The postponement of an execution which has been improperly used to protect the debtor's property, takes place because such conduct is a fraud upon junior creditors; but where the latter consent to such use of the first execution, the writ does not lose its priority.<sup>6</sup> And although the execution was issued with the purpose of preventing other creditors from levying, its lien will not be postponed if the plaintiff did not use it solely for the purpose of a lien, nor interfere with the sheriff in the performance of his duty, nor give any directions inconsistent with the mandate of the writ.<sup>7</sup>

Whatever *laches* an execution-creditor may have been guilty of, if, before a subsequent writ has come to the sheriff's hands, he wakes up and orders the sheriff to proceed, he is safe.<sup>8</sup> But where there is no order to proceed given before the second writ came into the sheriff's hands, the lien of the former writ is gone.<sup>9</sup> And where the first execution-plaintiff alleges that the order to proceed was given before the second writ came into the sheriff's hands, he must prove this fact affirmatively.<sup>10</sup> And where no intervening creditor's right is thereby affected, the priority of an execution-creditor is revived by the failure of an arrangement, made between him and a subsequent execution-creditor, upon which the stay was based: however liable for his default in the arrangement, the first creditor is not bound to lose his debt by parting with his priority, without receiving the stipulated equivalent for it.<sup>11</sup>

If the sheriff is directed not to proceed, but disregards the direction and proceeds without delay, the writ will not be postponed.<sup>12</sup> And where, in consequence of plaintiff's request, he delayed

<sup>1</sup> Howell v. Alkyn, 2 Rawle 282, as explained in Hickman v. Caldwell, 4 Ibid. 376.

<sup>2</sup> McCoy v. Reed, 5 Watts 302.

<sup>3</sup> Ibid.

<sup>4</sup> Earl's Appeal, 1 Harris 483.

<sup>5</sup> See Cowden v. Brady, 8 S. & R. 510.

<sup>6</sup> Fletcher's Appeal, S. Ct. 17 Leg. Int. 300, explaining Reamer's Appeal, 6 Harris 510.

<sup>7</sup> Brown's Appeal, 2 Casey 490.

<sup>8</sup> Deacon v. Govett, D. C. Phila., 4 Phila. Rep. 7.

<sup>9</sup> Christy v. Reynolds, D. C. Phila., 17 Leg. Int. 20.

<sup>10</sup> Freeburger's Appeal, 4 Wright 244.

<sup>11</sup> Post v. Naglee, 1 Barr 168.

<sup>12</sup> Lancaster Savings Institution v. Weigand, D. C. Lancaster, 3 P. L. J. 523.

advertising the sale for only one day and then proceeded, it was immaterial.<sup>1</sup>

A stay by order of plaintiff, where there is no collusion shown between plaintiff and defendant, and where the property was left in defendant's possession, was used by him as before the levy, and either consumed and disposed of by himself, or sold under subsequent judgments and executions, will not operate to postpone, in favor of junior judgments, the lien of plaintiff's judgment upon the real estate of defendant.<sup>2</sup> So the plaintiff may withdraw his writ without necessarily discharging his lien on the real estate as respects other judgment-creditors.<sup>3</sup> But where the plaintiff was prevented from selling the goods in consequence of his own agreement not to sell, but to use the levy for the purpose of protecting the property from other executions, his judgment will be postponed: and it was not proper to submit to the jury whether such an understanding was a material inducement to the confession of the judgment; the contract itself sufficiently established the intention of the parties.<sup>4</sup>

Orders to stay proceedings form a class of cases different from those relinquishing them altogether, as where a plaintiff directs the officer "not to proceed further on his writ," "to put no more costs upon it," &c., which will postpone him to a subsequent *fi. fa.*<sup>5</sup>

We have seen that the goods are at the risk of the officer, who is liable for their safe custody till the sale. If they are removed without his consent, he may have an action against the person taking them away. A constable making a levy has no right to remove goods previously levied on by another, while they are subject to the first levy, but the right to the proceeds is determinable by law.<sup>6</sup> But where the sheriff left the goods in the custody of strangers to the writ, upon their giving him a sealed obligation to return them at a time and place specified, he cannot have trespass against the defendant for taking the goods away before the time for their return had expired, because till its expiration he was not entitled to the possession of the goods.<sup>7</sup> So where the officer levied on property of a tenant, and went away without making an inventory or putting any one in possession, the lien of the levy is lost, and a subsequent distress upon part of the goods by the landlord, who had no knowledge of the levy, is valid.<sup>8</sup>

*Proceedings where the goods are claimed as the property of a stranger.*—The sheriff, under the writ of *fi. fa.*, is bound at his peril to take only the goods of the defendant. He is therefore a trespasser if he take the goods of a third person, though the plaintiff assure him they are the defendant's property.<sup>9</sup> On the other hand, if he refuse to levy, and returns the writ *nulla bona*, he is liable to the plaintiff.<sup>10</sup> In such case the sheriff may, for his own protection, either demand indemnity from the plaintiff and apply to the court for a rule staying

<sup>1</sup> *Childs v. Dilworth*, 8 Wright 123.

<sup>2</sup> *Morrison v. Hoffmann*, 1 Barr 13; *Campbell's Appeal*, 8 Casey 88.

<sup>3</sup> *Cathcart's Appeal*, 1 Harris 416.

<sup>4</sup> *Lyon v. Hampton*, 8 *Ibid.* 46.

<sup>5</sup> *Kauffelt's Appeal*, 9 Watts 334.

<sup>6</sup> *Winegardner v. Hafer*, 3 Harris 144.

<sup>7</sup> *Lewis v. Carsaw*, 3 Harris 31.

<sup>8</sup> *McHugh v. Malony*, D. C. Phila., 4 Phila. Rep. 59.

<sup>9</sup> 2 Bac. Abr. 715; 4 T. R. 633.

<sup>10</sup> *Nagle v. Strch*, 4 Watts 125.



proceedings, and enlarging the time for him to make his return, until indemnity be given; or if he has actually levied on the goods before the claim was made, he may take out a rule under the Sheriff's Interpleader Act, and require the claimant to establish his alleged title before a jury. But it is his duty, on being indemnified by the plaintiff, to sell the goods levied on, or, if they be claimed by others, to apply for an interpleader: it is irregular and unwarrantable to return that the property was claimed by others who had given bond.<sup>1</sup>

*Of indemnity.*—The sheriff has at common law a right to indemnity before seizing goods on a *feri facias* in which the property of the defendant is disputed: and a refusal to indemnify in a case where it might reasonably be demanded by the sheriff, would be a justification in an action for a false return.<sup>2</sup> And this right to indemnity applies to seizures under a foreign attachment or attachment-execution.<sup>3</sup> But not to levy on real estate.<sup>4</sup>

The proper practice when indemnity is necessary, is for the sheriff to take a rule to stay proceedings until indemnity is given.<sup>5</sup> And on the suggestion of a reasonable doubt, the court will always enlarge the time for the sheriff to make his return, until the right be tried between the contending parties, or until one of them has given a sufficient indemnity.<sup>6</sup> An inquest of office cannot be held here as in England.<sup>7</sup> Nor will the court try the property in goods levied on, for this would deprive the party of his right to a jury trial.<sup>8</sup>

It has been suggested that when the claim is to a part only of the goods, the sheriff should make a special return that he has levied on certain goods, some of which he has sold and has the money in obedience to the writ—and that as to the residue there had been a claim of property interposed by a third person: if, after such a return, a *ven. exp.* were to issue without reasonable indemnity having been first tendered to the sheriff, the court would set it aside.<sup>9</sup>

Although the plaintiff has promised to furnish indemnity before the sale, yet the sheriff must demand it, or the want of it will not excuse him, if the goods turn out to be the property of defendant.<sup>10</sup> If indemnity is demanded and refused, the sheriff may either return *nulla bona*, or refuse to sell anything but the interest of defendant.<sup>11</sup>

There is no implied promise of indemnity to the sheriff on the part of an execution-creditor, where, through accident or mistake, but not under the special instructions of the plaintiff, the goods of a stranger have been levied on.<sup>12</sup> But an endorsement "levy at the

<sup>1</sup> Connelly v. Walker, 9 Wright 449.

<sup>2</sup> See 1 Dane's Abr. 125, c. 1, a. 42, § 5, 6: Spangler v. Commonwealth, 16 S. & R. 68; Corson v. Hunt, 2 Harris 510.

<sup>3</sup> Shriver v. Harbaugh, 1 Wright 401.

<sup>4</sup> Meyer to use, &c., v. Riot, D. C. P., March 6th 1848. See "Liability of Sheriff."

<sup>5</sup> Spangler v. Commonwealth, 16 S. & R. 71, per DUNCAN, J.

<sup>6</sup> Nagle v. Stroh, 4 Watts 125.

<sup>7</sup> Spangler v. Commonwealth, 16 S. & R. 68.

<sup>8</sup> Young v. Taylor, 2 Binn. 228.

<sup>9</sup> Hunt v. Hunt, D. C. Phila., 2 P. L. J. 297.

<sup>10</sup> Miller v. Commonwealth, 5 Barr 294.

<sup>11</sup> Patterson v. Anderson, 4 Wright 359.

<sup>12</sup> Fitler v. Fossard, 7 Barr 540.

risk of the plaintiff," is perhaps an agreement to indemnify the sheriff.<sup>1</sup>

The execution of a *fi. fa.* is one act, and though the indemnity bond be given after the levy but before the sale, yet the execution is made after giving the bond.<sup>2</sup>

When the sheriff has received, or is tendered, an indemnity, it is his duty to proceed, on pain of being fixed or attached for the debt.<sup>3</sup> Thus where the liability of goods levied on by a constable was disputed, and the plaintiff on the day of sale tendered a bond of indemnity which the constable rejected as insufficient, and the next day plaintiff tendered adequate security, but the constable refused to proceed unless certain designated security was given: *Held*, That the officer should have proceeded, and was liable for a false return.<sup>4</sup> Where a stranger to the writ claims a partnership interest in the goods, and the plaintiff refuses upon request made to indemnify the sheriff, he may either return the writ "*nulla bona*," or refuse to sell anything but the interest of the defendant in the goods.<sup>5</sup>

Where judgment in trespass against the plaintiff in the writ and the officer was obtained by a stranger claiming property in the goods levied on, it was held that the recovery against the plaintiff and the officer was in the character of joint trespassers, and the payment by the plaintiff of a portion of this judgment greater in amount than the penalty of the bond of indemnity previously given by him to the officer, was not a performance of the condition of the bond, but was merely a payment to the stranger for the trespass committed on his property, and therefore, the officer having paid a portion of the judgment in trespass less in amount than the penalty of the bond of indemnity, was entitled to recover on the bond to the amount of his loss.<sup>6</sup> Where the plaintiff in a second execution indemnified the sheriff, who thereupon proceeded to sell the goods, the plaintiff was held liable on his bond of indemnity, although the whole of the proceeds, being less than the amount of the first writ, were paid to the plaintiff in the first writ.<sup>7</sup>

Where, in trespass against the sheriff, the execution-plaintiff, who had given a bond of indemnity, defended the suit, but failing therein compromised for a certain amount, part of which he paid, and part was collected of the sheriff; and the latter then sued each of the parties on the bond, which was joint and several—the condition of the bond to save the sheriff harmless was broken when judgment was recovered against him, and he could recover as damages the amount he was obliged to pay through failure of the sureties to comply with such condition; and the record of the suit against the sheriff was admissible in evidence for him in this action to show the occurrence of the loss and damage, though the surety-defendant was

<sup>1</sup> Keyser's Appeal, 1 Harris 409, per ROGERS, J.

<sup>2</sup> Watmough v. Francis, 7 Barr 206; 4 P. L. J. 302.

<sup>3</sup> Watmough v. Francis, 7 Barr 217; Corson v. Hunt, 2 Harris 510; Welsh v. Bell, 8 Casey 12; Meeker v. Sutton, S. Ct., 2 Phila. Rep. 288. But see

Commonwealth v. Watmough, 6 Whart. 117.

<sup>4</sup> Meeker v. Sutton, S. Ct., 2 Phila. Rep. 288.

<sup>5</sup> Patterson v. Anderson, 4 Wright 359.

<sup>6</sup> Findlay v. Hutzell, 5 Casey 337.

<sup>7</sup> Watmough v. Francis, 7 Barr 207.

not a party to the action of trespass; but such record is not conclusive evidence of the amount of the damage, for that may have been increased by the misconduct of the sheriff.<sup>1</sup>

*Sheriff's Interpleader.*—In cases where the goods levied on are claimed by a stranger to the process, difficulties were formerly of frequent occurrence, and the officers were exposed to the hazard and expense of actions. The courts, in such cases, refused to stay proceedings, and direct an issue to try the title.<sup>2</sup> This is now remedied by the 9th section of the Act of 10th April 1848,<sup>3</sup> commonly called the Sheriff's Interpleader Act, at first confined to the counties of Philadelphia and Luzerne, but subsequently extended to the whole State.<sup>4</sup> This act provides, that where a claim is made to goods levied on, or entitled to be levied on, or to the proceeds thereof, upon application by the officer, made before or after the return of the writ, and either before or after suit brought against such officer, the court from which the process issued may call before it, by rule of court, the party issuing the writ and the claimant, and may thereupon exercise for the adjustment of said claim, and the relief and protection of the officer, all the powers and authorities necessary, and make such rules and decisions as shall appear to be just, under the circumstances of the case; the costs of such proceedings to be in the discretion of the court, and the court to have power to direct an issue for the trial of questions of fact when requisite.

The Act of 1848 is almost a verbatim copy of the British statute of 1 & 2 Will. IV., c. 58, § 6, and the English practice, under that statute, is adopted by our courts.<sup>5</sup> Upon the affidavit of the deputy,

<sup>1</sup> *Kuzzard v. Nagle*, 4 Wright 178.

<sup>2</sup> *Ins. Co. v. Ketland*, 1 Binn. 499.

<sup>3</sup> *Purd. Dig.* 437, pl. 44, Pamph. L. 450.

<sup>4</sup> *By Act of 10th March 1858, Ibid.* 438, pl. 46, Pamph. L. 91.

<sup>5</sup> *Masser v. Auble*, D. C. Phila., Saturday, May 6th 1848. Why the plaintiff and David Auble, Elizabeth Auble, Hiram Drake, L. R. Lockwood, should not maintain or relinquish their respective claims to the property levied on by the sheriff in this case. *Per curiam*. This is a rule taken by the sheriff under the provisions of the 9th section of an Act of Assembly, passed April 10th 1848, entitled "An Act relating to the chancery powers of, and to the jurisdiction and proceedings in, certain courts," in which, after reciting that "difficulties often arise in the execution of process against goods and chattels issued by or under the authority of the courts in the city and county of Philadelphia, and the county of Luzerne, by reason of claims made to such goods and chattels by persons not being the parties against whom such process has issued, whereby sheriffs

and other officers are exposed to the hazard and expense of actions; and it is reasonable to afford relief and protection in such cases to such sheriffs and other officers," it enacts, that, "when any such claim has been or shall be made to any goods or chattels taken, or entitled to be taken in execution, under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for said courts from which such process issued, upon application of such sheriff or other officer, made before or after the return of such process, and as well before as after any action brought against such sheriff or other officer, to call before them, by rule of said court, as well the party issuing such process, as the party making such claim, and thereupon to exercise, for the adjustment of such claim and the relief and protection of the sheriff or other officer, all the powers and authorities necessary, and make such rules and decisions as shall appear to be just, under the circumstances of the case, and the cost of all such proceedings shall be in the discretion of the court: *Provided*, it

that he has made actual levy, and taken actual possession under the *fi. fa.*, and of the claim being made, the sheriff applies for a rule on the plaintiff and the claimant to show cause why they should not maintain or relinquish their respective claims to the property. To entitle the sheriff to the rule, he must have made an actual levy, and taken actual possession of the goods;<sup>1</sup> an actual claim should

shall be lawful for the court to direct an issue for the trial of questions of fact, whenever the circumstances of the case require it." This act is almost verbatim a copy of the British statute 1 & 2 W. IV. c. 58, s. 6. We have the advantage of the practice of the English courts in carrying it into operation, and this we have determined to adopt. The rule which was taken by the sheriff accords with that practice, and all the parties have appeared. The plaintiff has relinquished his claim as to the goods claimed by Lockwood; the other claimants still maintain their respective rights, and have laid before the court affidavits in support of them. The order made by the court in this case is as follows: That the sheriff file an inventory of the goods levied on. That the plaintiff, having, by his counsel, in open court, relinquished any claim upon the goods claimed by Lockwood, ordered that the sheriff withdraw from his possession of the goods claimed by Lockwood, and that plaintiff take no proceedings against him in respect of the goods so claimed. And ordered, that feigned issues are directed to be framed on or before the first Monday of June next, between the plaintiff and David Auble, Elizabeth Auble, and Hiram Drake, respectively, upon wagers in the usual form, to determine whether the right of property in the goods levied on, or any and what part thereof, is in the defendant or in the claimant, respectively—in which issues the respective claimants shall be the plaintiffs, and the plaintiff in this suit, defendant; and all proceedings on the said execution are hereby stayed until the further order of the court.

There is an important difference between the two acts. The English statute speaks of claims made to "goods or chattels taken or intended to be taken in execution;" our act says, "taken or entitled to be taken, &c." Under the English statute the courts will afford relief to a sheriff before he has made an actual levy; in our State they will not. See next note.

<sup>1</sup> Baron v. McMakin, D. C. Phila.,

December 4th 1848. Why an attachment should not issue against the sheriff. *Per curiam.* This case grows out of a sheriff's rule of interpleader. It seems that on motion of the sheriff and filing of the usual affidavit of his deputy, that under a writ of *fi. fa.* he had taken possession of certain goods, &c., and that said goods still remain in the possession of the sheriff, the usual rule upon the plaintiff and claimant was granted. An inventory was filed, setting forth certain machinery, certain goods, and certain household furniture. The notice of the claimant was a general one—that he claimed the goods levied on. In answer to the rule, on May 22d 1848, the claimant filed an affidavit that, so far as he knew, there had been no actual levy, but that he had given the notice at the request of the sheriff's officer, and that nothing further being done, he supposed the levy abandoned, and proceeded, in the usual course of his business, to sell the dry goods. Another affidavit was filed June 6th, in which, after referring to the former affidavit, he relinquishes his claim to the machinery, and maintained it only as to the dry goods. On the 12th of June 1848, the court made the usual order, and "that all proceedings in said execution, so far as relates to the goods claimed, be stayed until the further order of the court." Under this order of court a feigned issue and bond was filed November 24th 1848. Of course it only comprehends the household furniture. The plaintiff then took a rule upon the sheriff to return the writ, and, upon his default, the rule for an attachment now before us.

Nothing is clearer than, to entitle the sheriff to the benefit of a rule to interplead, he must have made an actual levy and taken actual possession. He is responsible, then, for the safe keeping of the property until the final order of the court is complied with, and the issue and bond approved and filed. He may, then, with safety, and not till then, abandon the possession. If he suffers the defendant, or claimant, or any one else, to eloin the goods, he

appear to be made;<sup>1</sup> and not only this, but that something has been done under it, on the part of the alleged claimants, which shows that they intend to enforce their claims against the property seized.<sup>2</sup> If the claim is made by affidavit,<sup>3</sup> the affidavit need not be made by the claimant himself.<sup>4</sup> An action of trespass against the sheriff is a sufficient claim to entitle him to the rule.<sup>5</sup> Where two different plaintiffs in executions against different defendants have directed the sheriff to levy upon the same goods, he cannot require the plaintiffs to interplead.<sup>6</sup> If the sheriff has been guilty of laches in applying for the rule he is not entitled to relief;<sup>7</sup> nor where he has already exercised a discretion in the matter.<sup>8</sup> The circumstance that the goods seized were in the possession of a stranger, and not of the execution-defendant, does not prevent the sheriff from applying to the court.<sup>9</sup> So, if the execution-creditor abandon his process in favor of the claimant, the sheriff has still a right of

becomes responsible if they are the goods of the defendant. If the claimant refuses to give bond, all that the court can do is to order the sheriff to proceed and sell. How can we say, as we have been asked to do in this case, you shall not give bond for part, unless you give bond for the whole of what you originally claimed? We can imagine how such a precedent would work.

It might, perhaps, be said, that the order of the court, staying proceedings, was necessarily to be referred to the goods, the claim of which was finally maintained on the hearing of the rule. Such is, undoubtedly, the interpretation to be placed upon the general order of the court. This was, however, an early case under the Act of Assembly, before the general order was made. We discharge this rule for an attachment, and make the following order:—

*Ordered*, That the sheriff do proceed with the execution in this case, so far as regards the goods levied on not mentioned in the feigned issue and bond of the claimant filed. Rule discharged.

<sup>1</sup> Bently v. Hook, 2 Dowl. Rep. 339; 2 Cramp. & M. 426; 2 Tyr. Rep. 229, s. c.; and see Parker v. Linnett, 2 Dowl. Rep. 562, per PARRISON, J.

<sup>2</sup> Isaac v. Spilsbury, 10 Bing. 3; 3 Moore & S. 341; 2 Dowl. Rep. 211; 6 Leg. Obs. 458, s. c.

<sup>3</sup> See the form of the affidavit, Smith's Forms 373, pl. 17.

<sup>4</sup> 7 C. B. 187; 6 D. & L. 597.

<sup>5</sup> Vandyke v. Bennett, D. C. Phila., Saturday, October 28th 1848. Why the plaintiff and Elijah Prentiss should not maintain or relinquish. *Per curiam*. This is the usual sheriff's rule to inter-

plead, and the objection raised is, that no claim was made to the goods. This objection is made by the claimant, who produces his own affidavit, asserting that the goods levied on are exclusively his property, and he had actually brought an action of trespass against the sheriff for the same. It seems too plain for argument that such an action is sufficient claim to authorize us to make the rule. The Act of Assembly was intended for the protection of the sheriff in cases of this character. It is not for us to question its policy, but to carry out the intention of the legislators in good faith. It is plain that the construction contended for by the claimant would make it a dead letter. Rule absolute.

<sup>6</sup> Vandyke v. Bennett; Chase v. Prentiss; D. C. Phila., December 23d 1848. Sheriff's rule to interplead. Same rule. *Per curiam*. Two different plaintiffs in executions against different defendants, have directed the sheriff to levy upon the same goods. Under the first writ, he, of course, levied and took possession of the property as the property of the first defendant. The goods being in the custody of the law, the second execution-creditor has no right to require him to seize them manually under the second writ. Under the first writ, he must deliver possession to the purchaser; all that he can do under the second, is to sell the right, title, and interest of the defendant. In no event, if he pursues this course, can he be responsible to the plaintiff in either execution. Rule discharged.

<sup>7</sup> 4 C. B. 371.

<sup>8</sup> 4 C. B. 760.

<sup>9</sup> Allen v. Gibson, 2 Dowl. Rep. 292.

coming to the court, even after the goods are sold.<sup>1</sup> And it is not necessary for the sheriff to apply to the different parties for an indemnity before he applies to the court under the act.<sup>2</sup> And he need not wait till an action is brought against him.<sup>3</sup> A precedent for the form of the sheriff's application for the rule may be found in Smith.<sup>4</sup> He cannot safely abandon the possession until the final order of the court is complied with, and the issue and bond are approved and filed. If he suffers the defendant, or claimant, or any one else to eloin the goods, he becomes responsible, if they are the goods of the defendant.<sup>5</sup>

*Rule of the District Court.*—The District Court of Philadelphia has made the following general rule to regulate proceedings under the act: "That whenever a rule taken by the sheriff, under the 9th section of the Act of Assembly, passed April 10th 1848, entitled 'An act extending the chancery powers of, and to the jurisdiction and proceedings in, certain courts,' shall be made absolute by the court, without any special order or direction, a feigned issue shall be framed in such case, upon a wager, in the usual form, to determine whether the right of property in the goods levied on and claimed, or any part thereof, is in the defendant or in the claimant, in which issue the claimant shall be the plaintiff, and the plaintiff in the execution the defendant. That the declaration in such issue shall be filed by the claimant within fourteen days from the time such rule is made absolute; and within said time the claimant shall give bond to the plaintiff in such penal sum, and with such security as shall be approved by one of the judges of this court, conditioned that the goods levied on and claimed shall be forthcoming upon the determination of the said issue to answer the execution of the plaintiff, if said issue shall be determined in favor of the said plaintiff in the execution, or so many of them as shall be determined to belong to the defendant, and to be subject to the execution of the said plaintiff. That when said declaration is filed, and bond given, the sheriff do withdraw from the possession of such of the goods and chattels, seized by him under the execution, as are claimed by the claimant; that no action be brought against the said sheriff in respect of the said goods and chattels; and that the question of costs and all further questions be reserved until after the trial of the said issues."<sup>6</sup>

This rule has been adopted by the Supreme Court at *Nisi Prius*.<sup>7</sup>

If the plaintiff in the execution abandon his claim wholly or in part, or fail to appear at the return of the sheriff's rule,<sup>8</sup> the court

<sup>1</sup> Baynton v. Harvey, 3 Dowl. Rep. 344.

<sup>2</sup> Crossly v. Ebers, 1 Harr. & W. 216.

<sup>3</sup> Green v. Brown, 3 Dowl. Rep. 337.

<sup>4</sup> Smith's Forms 372, pl. 16.

<sup>5</sup> Baron v. McMakin, *supra*, 900, n. 1.

<sup>6</sup> Rules D. C. XLII., Walker's Rules 18.

<sup>7</sup> Rules S. Ct., N. P. XXIX., Walker's Rules 1184.

<sup>8</sup> McCorn v. Esher, D. C. Phila., Saturday, May 13th 1848. Why the

plaintiff and Jacob Esher should not maintain or relinquish. *Per curiam*. In this case, service of the rule has been accepted by the plaintiff's attorney, but he has not appeared to maintain his claim. The claimant has exhibited to the court, on the other hand, the evidence of his title.

*Ordered*, That the plaintiff not having appeared in obedience to the rule to maintain his claim, the sheriff withdraw from his possession of the goods

will order the sheriff to withdraw from the possession of the goods, or from so much thereof as he relinquishes.<sup>1</sup>

If the claimant abandon his claim, wholly or in part, the court will on motion order the sheriff to proceed in respect to the goods so abandoned.<sup>2</sup> But the failure of the claimant to interplead does not make it the duty of the sheriff to sell, whether the goods belong to the defendant in execution or not; and therefore the sheriff, in an action against him by the execution-plaintiff, is not precluded from showing that the goods belonged to a third person, although such person may have failed to join issue under the rule of interpleader: the object of the Interpleader Act is to protect the sheriff against the *claimant* in case he does not proceed under the interpleader.<sup>3</sup>

If the parties maintain their claim under the sheriff's rule, the court will order the sheriff to file an inventory, if that be not already done; will prescribe a feigned issue to be framed, to which the claimant is made plaintiff, and the execution-plaintiff is made defendant, and will order proceedings under the execution stayed until further order.<sup>4</sup> The form of the issue may be found in Smith.<sup>5</sup>

The order staying proceedings, and the order to the sheriff to withdraw from the possession of the goods, upon a forthcoming bond being filed by claimant, do not affect the lien of the execution, however long it may be pending; on the giving of the bond, the property is placed in the possession of the claimant; his custody is substituted for the custody of the sheriff; the property is not withdrawn from the custody of the law: in the hands of the claimant under the bond the property is as free from the reach of others as it would have been in the hands of the sheriff.<sup>6</sup>

levied on, and which are claimed by Jacob Esher, and that the plaintiff take no proceedings against him in respect of the goods so claimed.

<sup>1</sup> *Masser v. Auble*, ante, p. 809, n. 5.

<sup>2</sup> *Baron v. McMakin*, ante, p. 900, n. 1.

<sup>3</sup> *Commonwealth v. Megee*, D. C. Phila., 4 Phila. Rep. 258.

<sup>4</sup> *Masser v. Auble*, *ubi supra*.

<sup>5</sup> Smith's Forms 374, pl. 19.

<sup>6</sup> *Johnston v. Minor*; *Struthers v. Minor*, D. C. Phila., June 4th 1848. Why the plaintiffs should not take the amount of their executions out of court. *Per curiam*. We have had considerable difficulty in arriving at our judgment in these cases. The point which arises is entirely new, and requires a very important principle to be settled upon the construction of the 9th section of the Act of April 10th 1848, commonly known as the "Sheriff's Interpleader Act." On June 27th 1848, Sayres levied an execution against Minor, "upon all the right, title, and interest of the de-

fendant in a certain establishment," &c. Conkling claimed to be the owner of this establishment. The sheriff took the usual rule, which was made absolute; a feigned issue was formed between Conkling as plaintiff, and Sayres as defendant, and a bond for the forthcoming of the property given by Conkling, with sureties; and, thereupon, the sheriff withdrew from the possession. The feigned issue is still pending and undetermined. On Sept. 18th, 1848, another *fi. fa.* at the suit of Rankin against Minor, was levied upon the same property.

On Feb. 8th 1849, the plaintiffs in these two cases issued executions against the same defendant, to which the sheriff returns that he has levied upon the personal property of the defendant, subject to the two prior levies of Sayres and Rankin; and then goes on to state specially the fact of the issue, and bond, &c., and that he has sold the property for a certain sum. The money has been paid into court, and the question pre-

The order of court applies to absent claimants.<sup>1</sup>

*The bond.*—In some cases the court do not require security from the claimant other than his own bond. But this is only where the claimant's case is *prima facie* very clear; as where he avers that he does not derive title from or through the defendant, and is in exclusive possession;<sup>2</sup> or his title is derived from a judicial sale of

sented by this motion, is, whether the property was discharged by the proceedings upon the sheriff's rule of interpleader, from the lien of Sayres's execution. As to Rankin's execution, he does not appear to be represented here; and were we about to make any order which could prejudice, we would delay it until such time as he could have an opportunity to be heard. We are of opinion, however, that the property has not been discharged by the proceedings upon the sheriff's rule of interpleader. The lien of an execution once attached upon personal property, continues until that property passes to another by a judicial sale unless it should, in the mean time, be discharged by the laches of the party, or the sheriff. The law does no man wrong. A rule staying proceedings, being an act of the court, never affects the lien of the execution, however long it may be pending. The sheriff, under such a rule, continues answerable for the forthcoming of the property. The sheriff's rule of interpleader is, after all, nothing but a rule to stay proceedings until a certain question arising has been settled. To relieve the sheriff—to relieve the claimant, and restore him the use of his property—to relieve the plaintiff and defendant, that the goods may not be, in the mean time, eaten up by the costs and expenses—the court have adopted the practice of taking security from the claimant to the value of the goods, and then directing the sheriff to withdraw from the possession. If the goods in question should be eligned, then, indeed, the plaintiff is turned over for his remedy to his bond; but if the identical goods can be followed and retaken, they may be re seized, and sold either upon the same writ of *fi. fa.*, or *venditioni exponas*, grounded thereon, according to the circumstances. Why should the plaintiff be stripped of his security without his consent, further than is absolutely necessary for the administration of justice between the parties? He never agreed to substitute the bond for his lien, or to release the goods—it was the act of the court. He has been guilty of no laches. Nor are there any such

overwhelming inconveniences as have been supposed. There are no markets overt in Pennsylvania. The *bond fide* purchaser from a wrongful possessor acquires no title. A sale, by the claimant, of the goods left in his possession, will convey no title unless he is the owner. The man who buys, and pays his price, takes the goods with the implied warranty of title of the vendor, nothing more. It is upon that security our daily purchases are all made. Every loaf of bread or yard of muslin we buy, for daily consumption, may be followed into our hands by the real owner. Such has been the law of Pennsylvania for more than a century and a half, and society has, nevertheless, got along very well. Occasional hard cases have been more than compensated by the security of property which the general principle has afforded.

In the case of *Hogan v. Lucas*, 10 Peters 400, where there was a proceeding, under a law of the State of Alabama, precisely analogous to this, the Supreme Court of the United States held that the lien of the execution was not discharged by the giving of bond with security. Says Judge McLEAN, in delivering the opinion of the court: "On the giving of the bond the property is placed in the possession of the claimant. His custody is substituted for the custody of the sheriff. The property is not withdrawn from the custody of the law." In the hands of the claimant, under the bond for its delivery to the sheriff, the property is as free from the reach of other processes as it would have been in the hands of the sheriff. R. D. S. P., *Hogan v. Lucas*, 10 Peters 400. See *Commonwealth v. Contner*, 6 Harris 446; 20 Eng. Law & Eq. Rep. 212.

<sup>1</sup> *Moore v. Lelar*, D. C. Phila., 1 Phila. Rep. 72.

<sup>2</sup> *Rump v. Williams*, D. C. Phila., Saturday, October 21st 1848. Why the claimant should not be allowed to give bond without surety. *Campbell v. Same*. Same rule. *Per curiam*. In these cases, a sheriff's rule to interplead under the 9th section of the Act of April 10th 1848, Pamph. L. 450, has been made abso-



defendant's goods.<sup>1</sup> So where the defendant, a commission merchant, received the goods from the claimant to be sold on commission.<sup>2</sup> But where the claimant claims under a bill of sale from the

lute. Under the general order of this court in such cases, it is the duty of the claimant to file a *narr.* in the feigned issue awarded within fourteen days, and to give bond with sufficient security, to be approved by one of the judges of the court, that the goods levied on and claimed shall be forthcoming to answer the plaintiff's execution, in case the issue be determined against the plaintiff. If the claimant desires that the time for this purpose should be enlarged, he must make a special application to the court, which, upon reasonable cause shown, will enlarge the time. If he neither files his *narr.* nor gives the bond, the court, on motion of the sheriff or plaintiff in the execution, will make an order that the sheriff do proceed with the said execution, and that the claimant be barred of any action against the sheriff or any one acting by his authority, saving, however, his right of action against the plaintiff and all others. If he files the *narr.* but neglects to give the bond, the court, on motion, will order the sheriff to proceed and sell, and pay the proceeds of the sale into court, to abide the determination of the issue, and that the claimant be barred of any action against the sheriff and his officers in respect of such seizure and sale, saving his rights against the plaintiff and all others. Where, however, the case of the claimant is *prima facie* very clear, as where he avers that he does not derive title from or through defendant, and is in exclusive possession, or that his title is derived from a sale of defendant's goods under public authority, the claimant may obtain a rule on the plaintiff in the execution, to show cause why he should not be permitted to give his bond without security. This is the rule which has been taken in this case. We are not satisfied, however, that a sufficient case has been made out. The execution of Campbell and Rump was for partnership debts, though on judgments against Bradley alone. Under that execution, as appears by the affidavit of the sheriff's officer, he took actual possession, as he had a right to do, of the partnership goods, on the 18th July 1848. While the goods were thus in the actual possession of the sheriff, a levy was made by a constable, under an execution against Bradley

alone, of all his interest in the goods, and a sale made to Martin Ryan. He says he is in exclusive possession. It is evident, however, that he shows no right against the sheriff under the prior execution. His possession, as far as appears, is a tortious one, as was that of the constable. If, however, the sheriff did not take actual possession, when he made the levy, then, perhaps, the plaintiff has lost his lien, and his recourse ought regularly to be against the sheriff. How far he may have lost that recourse by his submitting to the sheriff's rule to interplead being made absolute, it is not now for us to decide. Rule dismissed.

<sup>1</sup> *Peter v. Barron*, D. C. Phila., Dec. 23d 1848. Why the claimant should not give bond without security. *Per curiam*. The claim is under a prior sheriff's sale of the same goods. The plaintiff might have controverted the fact, or shown circumstances to induce a suspicion that the sale was not conducted in the usual fair and open manner. He has not done so; but relies upon the simple fact that the claimant was the plaintiff in the prior execution, and the purchaser of all the goods levied on. We do not think that of itself ought to put the claimant to giving security. Rule absolute. Time extended to Dec. 30th 1848.

<sup>2</sup> *Faulkner v. Voight*, D. C. Phila., No. 27, Saturday, November 4th 1848. Why sundry claimants should not give bond without surety. No. 28. Why the defendant should not give bond for Bergner, Sen. & Co. *Per curiam*. It appears that the defendant in this case is a commission merchant, and received the goods which have been levied on in that capacity from the claimants. They have never been the property of the defendant, nor do the claimants claim in any way through them. This is a case, then, in which we think they ought not to be required to give security beyond their own bonds. As to the case of the claimant who resides abroad, we do not think it would be proper to take the bond of the defendant, for whose debt they have been levied on. The court will extend the time for giving security in that case for a reasonable period; but if it cannot be obtained, the goods will have to be sold, and the proceeds paid

defendant, the court will always require security even though the possession has been changed.<sup>1</sup> Where the claimant is wife of the defendant, her husband's bond cannot be taken.<sup>2</sup> Where claimant is a married woman, the bond is sufficient if executed by the surety only; it need not be signed by such claimant.<sup>3</sup>

A form of bond which differs very little from that contained in the notes to the former edition of this work, will be found in Smith's Forms.<sup>4</sup>

*Pleadings.*—It is the duty of the claimant to file a *narr.* within fourteen days. If he desires the time to be enlarged he applies to the court specially for that purpose. If he neither files the *narr.* nor gives bond, the court, on motion of the sheriff or the plaintiff in the execution, makes an order that the plaintiff do proceed, and that the claimant be barred of action against the sheriff, saving his right of action against the plaintiff and all others. If he files a *narr.* but neglects to give bond, the court on motion will order the sheriff to sell and pay the proceeds into court to abide the determination of the issue, and that the claimant be barred of an action against the sheriff.<sup>5</sup> It is not a good plea in an action on the bond, to allege that the jury found by their verdict that the claimant was interested as a partner with the defendant, and that the interest which the latter had on a settlement of the accounts was nothing: the whole of the finding was surplusage and beyond the issue—neither on the interpleader nor in an action on the bond can the court try an account-render between partners. In this case the claimant should have originally put in his claim in the character of partner, and the plaintiff would then have had the option of

into court to abide the determination of the issue. No. 27, Rule absolute. No. 28, Rule dismissed.

<sup>1</sup> *Butterfield v. Hirst*, D. C. Phila., December 4th 1849. Why claimant should not give bond without surety. *Per curiam.* We do not think that this is a case in which the claimant should be relieved from giving security. It appears that she made a conditional sale to the defendant, with a stipulation that she should retain the property until the purchase-money is paid. It depends upon the question whether possession was delivered to the vendee: if it was, the sale was fraudulent as to creditors. We have always refused to relieve a party claiming under a bill of sale from defendant, from giving security, merely on the allegation that possession had changed. It is a question for the jury, not for the court. This is a strictly analogous case.

R. D.

<sup>2</sup> *Jacobs v. Wells*, D. C. Phila., Saturday, March 30th 1850. Why claimant's husband should not give bond.

*Per curiam.* This is a case under the Sheriff's Interpleader Act. The claimant is defendant's wife, who shows, indeed, that she does not derive title from her husband. Her own bond to restore would not bind her. She asks us to allow defendant's bond to be taken. We think, however, that we cannot do this, and that some person, not the defendant, must be found to answer for the forthcoming of the goods. Plaintiff has already the defendant for debt; defendant would not increase his present responsibility one iota by it. The payment of the debt, which he is already bound for, would discharge the debt bond. It may be unfortunate for a party like the claimant to be placed in this position, but we do not think we can relieve. If she cannot give security, the goods can be sold and the money paid into court to await the determination of the issue. R. D.

<sup>3</sup> *Warder v. Davis*, 11 Casey 74.

<sup>4</sup> Page 373, pl. 18.

<sup>5</sup> McCall's MS. Lectures.

directing the sheriff to sell only the right, title, and interest of the debtor.<sup>1</sup>

If after verdict for defendant on the issue the goods are still in the claimant's possession, they may be seized under a *fi. fa.*; or if eloiigned the plaintiff has his remedy on the bond.

The condition of the bond is broken if *all* the goods are not forthcoming.<sup>2</sup>

The plea of payment, supported by the sheriff's return of sale as to the property described in the bond, is an answer to an alleged breach that the property was not forthcoming to answer the suit, though but one of the interpleader issues had been determined before the sale.<sup>3</sup>

It is no defence to an action on the bond, that part of the goods remained in partial satisfaction of the plaintiff's execution, especially where those goods were not produced, but were claimed as exempt under the Exemption Law.<sup>4</sup>

The sheriff's return to plaintiff's execution is competent evidence on the part of defendant in an action on the bond, not only of the seizure of the chattel, but of its sale and the money made, to show that in accordance with the condition of the bond the property had been forthcoming.<sup>5</sup> But his return to another writ levied on the same property, is not evidence against the plaintiff in such action because irrelevant.<sup>6</sup>

The plaintiff in the execution will not be required to give security for damages; but where he is a non-resident he will be ordered to give security for costs.<sup>7</sup>

*Feigned issue.*—In framing the feigned issue, it is the duty of the court to call before them all parties making claim to the goods.<sup>8</sup> The claimant is in all cases to be the plaintiff, and the burden of the issue is upon him in the first instance; if he fails to make out his case there must be a verdict for the defendant in the issue, and the jury need not in such a case go on to inquire into the ownership of the goods.<sup>9</sup> Where the defendant in the issue was a second execu-

<sup>1</sup> Ward v. Zane, D. C. Phila., 4 Phila. Rep. 68.

<sup>2</sup> Hill v. Robinson, 8 Wright 380.

<sup>3</sup> Hill v. Grant, 13 Wright 200.

<sup>4</sup> Hill v. Robinson, 8 Wright 380.

<sup>5</sup> Hill v. Grant, 13 Wright 200.

<sup>6</sup> Ibid.

<sup>7</sup> Belmont v. Norris, D. C. Phila., Saturday, April 27th 1850. Why plaintiff should not give security for damages. *Per curiam*. This is a case in which an interpleader has been awarded on motion of the sheriff. We see no reason for ordering the plaintiff in the execution to give security for damages. Unless the sheriff has been guilty of some outrage, there can be nothing but nominal damages; if he has, upon its being shown by deposition, the court would not relieve him by granting the interpleader.

The plaintiff being a non-resident, we order him to give security for the costs of the issue. In that respect, though in form defendant in the issue, the case is analogous to replevin, in which both parties are actors.

Security ordered in costs.

<sup>8</sup> Van Winkle v. Young, 1 Wright 214.

<sup>9</sup> Conkling v. Sayers, D. C. Phila., Oct. 14th 1848. *Per curiam*. This was an application to the court to settle what are the proper terms of an issue under the general order made by the court in the case of rules to interplead for relief of the sheriff under the late Act of Assembly. The words of the order express the issue whether the right of property in the goods levied on be in the claimant or in the defendant in the execution. The claimant is

tion-creditor, the creditor in the first writ taking no part in the proceeding, and the verdict was for the defendant, the proceeds of the subsequent sale of the goods were awarded to the first writ.<sup>1</sup> The question to be tried on the issue is the right of the sheriff to levy on and sell the goods in controversy as the personal property of the defendant in the writ, and it is therefore immaterial whether the claimants, who are made plaintiffs, are joint owners or owners of unequal proportions, provided they are in fact the owners of the goods.<sup>2</sup> If one of two or more claimants establishes a right to any of the goods levied on, he is entitled to a verdict.<sup>3</sup>

Where the goods are claimed as the *property* of a stranger, the claimant cannot on the trial show a right to their *possession* as lessee; having made a claim to the absolute ownership and thus stayed the plaintiff's execution, he cannot on the trial set up a limited interest.<sup>4</sup> It has been said, that when the claimant means at the trial to vary from the title previously set up, it will in all cases be the safest practice for his counsel to give distinct notice of such intention a reasonable time before the trial.<sup>5</sup>

Where there were fraudulent circumstances connected with the sale and transfer of the property from the defendant in execution to the claimants, it was not error for the court to refer the facts to the jury, with instruction that in case the sale was not made in good faith, but to hinder and delay creditors, their verdict should be for the defendants in the issue.<sup>6</sup>

Where the claimant derived his title to a ship under a bill of sale, which was not recorded till after the date of the levy mentioned in the return, and which, therefore, under the Act of Congress, conveyed no title as against the execution-creditor of the assignor, he was not allowed, on the trial of the feigned issue, to contradict the return to his own writ by showing that the levy was actually made on a later day than the one named in the return.<sup>7</sup> A mistake in

in all cases to be the plaintiff, and the burden of the issue is upon him in the first instance. If he fails to make out his case, there must be a verdict for the defendant in the issue, and the jury need not in such a case go on to inquire whether the goods are the goods of the defendant, or whose goods they are. The claimant by the verdict is shown to be a stranger who has no right to intermeddle in what does not concern him. We are asked, however, in this case to go further, and make the particular title set up by the claimant a part of the issue. We ought not to do this. If he makes different and inconsistent claims at different times, that will be for the jury, and may be explained. To avoid the question whether evidence of a title different from that made to the sheriff ought to be admitted in evidence on the trial, it will in all cases be the safest practice for the counsel of the claimant, if he means to vary

from the title previously set up, to give distinct notice, a reasonable time before the trial, of such his intention, to enable his adversary to come prepared to meet it. As the whole proceeding is under the control of the court, it is in our power to adopt such a practice as will best conduce to a fair trial upon the merits.

<sup>1</sup> Childs v. Dilworth, 8 Wright 123.

<sup>2</sup> Van Winkle v. Young, 1 Ibid. 214.

<sup>3</sup> Ibid.

<sup>4</sup> Meyers v. Prentzell, 9 Casey 482; Stewart v. Wilson, 6 Wright 450.

<sup>5</sup> Conkling v. Sayers, *ante*, p. 907, n. 9.

<sup>6</sup> Stewart v. Wilson, 6 Wright 450.

<sup>7</sup> Hill v. Grant, 13 Wright 200. But notwithstanding the Act of Congress, an equitable interest in a vessel, which had been previously conveyed by the defendant in execution to a trustee for various creditors, may be set up by the *cestuis que trust*, on the trial of the feigned issue, against an execution-

the date of the levy, stated in the issue, is not amendable at the trial.<sup>1</sup>

It is too late to object to the legality of the levy after the rule for interpleader is made absolute.<sup>2</sup> If the levy was made after the return-day, the proper remedy for the claimant was an action of trespass against the execution-plaintiff.<sup>3</sup>

The questions which most frequently arise under the Sheriff's Interpleader Act, aside from cases where the officer has made a palpable mistake, the goods levied on belonging to an entire stranger to the writ, are mostly comprised in one of the following classes:—

1. Where the claimant derives his title from the defendant by sale or otherwise; 2. Where the defendant's wife claims the goods as her own by virtue of the provisions of the Married Woman's Act. These questions have been discussed at large in another place.<sup>4</sup>

Where the claimant set up a prior sheriff's sale of the goods to himself under his own execution, but there was evidence to show that there was no bill of sale placed on the store; that the ringing of the bell was a mere sham; that the goods were sold in lumping lots, and brought but from one-fifth to one-eighth of their value; and that the same business was continued by the claimant with the same clerk; the court refused to disturb a verdict which found the sale void under the Statute of Elizabeth.<sup>5</sup>

Where the defendant's wife claims to be the owner of goods, found by execution-creditors of her husband in the apparent possession of both, it is incumbent on her to rebut the legal presumption of ownership in her husband by competent and satisfactory evidence.<sup>6</sup> This may be done in part by written evidence of the fact that the property taken in execution had been purchased with funds contributed by a friend, for the purpose of enabling her to sustain the family through the agency of her husband: on the trial of the feigned issue it was not error to admit as evidence of separate ownership by the wife, a writing duly executed, acknowledged, and recorded, in which a sister of the claimant contributed a specified sum of money to be received, held, and used expressly and solely for the purpose of "affording relief and support" for the family, and in no manner for the interest of the husband, "excepting to the extent of the maintenance to be allowed him for his services to be rendered;" the grantor in such instrument having no lien on the property, nor present right to withdraw the fund so contributed, is a competent witness for the wife in such issue.<sup>7</sup>

Where bricks had been furnished to the execution-defendant, under an agreement that they should not be his until used in the

creditor of the original owner: *Richardson v. Montgomery*, 13 Wright 203.

<sup>1</sup> *Ibid.*; *Grant v. Hancock*, D. C. Phila., 20 Leg. Int. 348.

<sup>2</sup> *Grant v. Hancock*, *supra*.

<sup>3</sup> *Grant v. Hill*, D. C. Phila., 20 Leg. Int. 308.

<sup>4</sup> See *ante*, 788-96.

<sup>5</sup> *Van Reed v. Sorin*, D. C. Phila.,

March 1849. See *Gilbert v. Hoffman*, 2 Watts 66; *Wier v. Hale*, 3 W. & S. 285; *Smith's Appeal*, 2 Barr 331; and *ante*, p. 790. And see *post*, "Sheriff's Sale," p. 911-13.

<sup>6</sup> *Aurand v. Schaffer*, 7 Wright 363. And see *ante*, p. 795.

<sup>7</sup> *Gillespie v. Miller*, 1 Wright 247.

building, and should be paid for as used, and they were hauled to and placed near the building, such arrangement is a fraud *per se*, and the declaration of the execution-defendant that this arrangement was for the purpose of keeping his creditors at bay might be given in evidence.<sup>1</sup>

The execution-defendant may be a witness for the claimant.<sup>2</sup>

A judgment-creditor not directly interested in the event of the trial may be a witness.<sup>3</sup>

*Payment by defendant to sheriff.*—The defendant may prevent a levy or sale by paying the debt and costs to the sheriff.<sup>4</sup> And a sheriff with a *fi. fa.* in his hands is so far the agent of the plaintiff, that payments made to him by the defendant, before the return day of the writ, extinguish *pro tanto* the judgment.<sup>5</sup> And such payments may be indicated by endorsements upon the writ, and by receipts given by the sheriff to the defendant; and where there are such endorsements without date, and also receipts given to defendant in the lifetime of the execution, and the endorsements and receipts do not correspond, it is for the jury to say whether they were duplicates, and what amount was paid by defendant to the sheriff before the return day.<sup>6</sup> But after the return day of the writ, and after the sheriff has gone out of office, he is no longer the agent of the plaintiff, and payments to him by defendant do not bind the plaintiff unless actually paid over to him.<sup>7</sup> And where the sheriff has received money from the defendant both before and after the return day and the expiration of his term, and then pays over to the plaintiff a sum less than he had received before the return day—the plaintiff having no knowledge of the subsequent payments,—the defendant has no right to claim that what the sheriff paid over were the subsequent payments, and thus get credit for both these and the prior payments.<sup>8</sup> Prior to this it had been held that a payment by the debtor to the sheriff after the return day was good, and that the debtor was thereby discharged and the sureties of the sheriff rendered liable.<sup>9</sup>

If the sheriff accept payment in bank notes the debtor is discharged: the sheriff takes the notes as cash, and however worthless they may prove he must account for them as cash.<sup>10</sup>

If the money is paid the sheriff after levy under joint execution against two partners, and afterwards the judgment is set aside as to one of the defendants, the sheriff is still liable for the money to the plaintiff.<sup>11</sup>

Though, when the sheriff has two executions in his hands it is his duty to apply any levy he makes, whether upon goods or money, to the earliest writ, yet where money is voluntarily paid him by the defendant, with directions to hand it over to a specified creditor,

<sup>1</sup> Stiles v. Whittaker, D. C. Phila., 1 Phila. Rep. 271.

<sup>2</sup> Guillou v. Healy, D. C. Phila., 1 Phila. Rep. 335; Bank v. Beck, 13 Wright 394.

<sup>3</sup> Lothrop v. Wightman, 5 Wright 298.

<sup>4</sup> See Act 16th June 1836, § 41, Purd. Dig. 437, pl. 42, Pamph. L. 768.

<sup>5</sup> Slusher v. Washington Co., 3 Casey 206, per WOODWARD, J.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Beale v. Commonwealth, 7 Watts 185.

<sup>10</sup> Harper v. Fox, 7 W & S. 142

<sup>11</sup> Ibid.

he is bound to obey the instructions of the defendant in regard to its application; such money cannot be said to have been seized and taken in execution by the sheriff.<sup>1</sup>

Where there are several defendants, and the assignee of one pays the amount to the sheriff who marks the execution satisfied, if such payment was in reality a purchase of the judgment, the sheriff may correct the endorsement and proceed on his writ; but if the assignee had funds in his hands to pay the debt, and there are circumstances to show it was intended as a payment, the jury may so consider it, and the sheriff's proceeding afterwards on the writ will be considered a trespass.<sup>2</sup> This is said not to decide that an assignee may purchase a judgment against his assignor with his own funds and proceed by execution.<sup>3</sup>

*The sale and its incidents.*—On a *fi. fac.* it is the duty of the sheriff to sell the goods, if the debt and costs are not paid him. If he wilfully delay to sell for an unreasonable time, with a view to injure the defendant, he is liable to an action. And as the sheriff cannot retain the goods to his own use, on satisfying the debt of his proper money, so neither can he deliver them to the plaintiff in satisfaction of his debt. But, though they cannot be delivered to the plaintiff without a sale, they may be sold to him.<sup>4</sup>

Where several writs are in the sheriff's hands at the same time, the practice is to sell on all of them, and so return, leaving the responsibility of distribution to the court, as if the executions were liens on the money.<sup>5</sup>

*Time of sale.*—As to what length of time may elapse between a levy and sale, it seems there is no fixed rule.<sup>6</sup> A postponement to a day subsequent to the return day, will be equivalent to an indefinite postponement.<sup>7</sup>

*Manner of sale.*—The goods must be sold by public auction, a private sale not being justifiable in any case.<sup>8</sup> The 42d section of the Act of 1836<sup>9</sup> directs previous notice, by sufficient advertisements of such sale. Secret or private sales are thus effectually prevented. And hence, where an execution-creditor procured a special deputy to be appointed by the sheriff, and the goods levied on in a store were sold by him and the defendant, at private sale, until other *fi. fas.* were left with the sheriff, the execution was decided to be postponed as fraudulent and collusive.<sup>10</sup> And the case is the same whether the sale be before or after the return day of the writ, with or without notice.<sup>11</sup>

An agreement between counsel for execution-creditors, "that the

<sup>1</sup> Rudy v. Commonwealth, 11 Casey 166.

<sup>2</sup> Kuhn v. North, 10 S. & R. 399.

<sup>3</sup> Keller v. Leib, 1 Pa. R. 223, HUSTON, J.

<sup>4</sup> 2 Tidd Pr. 1013.

<sup>5</sup> McDonald v. Todd, 1 Grant 17.

<sup>6</sup> Howell v. Alkyn, 2 Rawle 286. HUSTON, J.

<sup>7</sup> Lantz v. Worthington, 4 Barr 153. GIBSON, J.

<sup>8</sup> Keyser's Appeal, 1 Harris 411. See Lynch v. Commonwealth, 6 Watts 495; McCreery v. Hamlin, 7 Barr 87; Bingham v. Young, 10 Ibid. 396; McMichael v. McDermott, 5 Harris 353.

<sup>9</sup> Purd. Dig. 437, pl. 43, Pamph. L. 768.

<sup>10</sup> Bingham v. Young, 10 Barr 396; Keyser's Appeal, 1 Harris 411.

<sup>11</sup> Ibid.

sheriff who had levied on a store of goods, &c., might appoint two persons to sell the goods, adjourning from day to day and paying over to the sheriff the proceeds of sales from time to time at least once a week, and that the sheriff should not be held responsible except for the money he received from the persons deputed to sell, and for any money received by him from other sources," though binding on the parties to it, is in law fraudulent as to creditors not assenting to such arrangement. It is not necessary for the counsel of another creditor, not a party to the arrangement, to object to it, in order to avoid its effect upon his client, it is sufficient if he did not assent to it.<sup>1</sup>

Before sale, notice must be given thereof by the officer, during at least six days, by not fewer than six handbills, to be put up at such places as he shall deem best calculated to give information to the public of such sale.<sup>2</sup> The time of the notice of sale cannot be abridged by consent of parties, and a sale to the plaintiff in such case would confer no title as against a subsequent execution.<sup>3</sup> And where there is no bidder present but the plaintiff in the execution, and no bystanders, it is incumbent on the plaintiff to inquire whether the requisite notice had been given, and a sale to the plaintiff under such circumstances, no notice having been given, is fraudulent and void.<sup>4</sup> The mere fact that there was no bidder but the plaintiff, and no bystanders, made the sale collusive and invalid.<sup>5</sup> It is his duty under such circumstances to adjourn the sale.<sup>6</sup> So a sale by a constable, due notice having been given, made to the plaintiff in the execution, no person but the constable being present, is illegal and invalid.<sup>7</sup> If there was only one bid offered and taken, without opportunity afforded for a second bid, the sale would be fraudulent; but where only one bid could be obtained, at which, after a reasonable effort to get another, the property was struck off, the sale would be valid.<sup>8</sup> It is not a ground of legal fraud that the sheriff had given the advertisements to the defendant to be posted, especially where there were many bidders at the sale.<sup>9</sup>

It seems that the sheriff is not bound to sell to the highest bidder when the price is greatly inadequate, but may adjourn the sale or return that the goods remain in his hands for want of buyers.<sup>10</sup> He may also disregard a bid conditioned that the money be applied to the bidder's execution, even though he was legally entitled to the proceeds of sale.<sup>11</sup> A bid reduced to writing before the sale is concluded, is a waiver of prior bids by the same person.<sup>12</sup>

A sale *in the mass* of an entire stock of lumber and coal to the plaintiff in the execution, is grossly irregular and void, and passes

<sup>1</sup> Reamer's Appeal, 6 Harris 510.

<sup>2</sup> Act of 16th June 1836, § 42, *Purd.* Dig. 437, pl. 43, *Pamph. L.* 768. This provision is taken from the Act of 21st March 1806, § 11.

<sup>3</sup> *Gibbs v. Neely*, 7 Watts 305.

<sup>4</sup> *McMichael v. McDermott*, 5 Harris 353.

<sup>5</sup> *Ibid.*, per *COULTER, J.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ricketts v. Unangst*, 3 Harris 90.

<sup>8</sup> *Swires v. Brotherline*, 5 Wright 135.

<sup>9</sup> *Allentown Bank v. Beck*, 13 Wright 394.

<sup>10</sup> 3 *Campb.* 521; but see 1 *Stark. N. P.* 43; 3 *Ibid.* 163.

<sup>11</sup> *Faunce v. Sedgwick*, 8 Barr 407.

<sup>12</sup> *Ibid.*



no title to the purchaser. The sheriff must sell separately or in parcels, unless there are circumstances to justify a departure from the rule. It is not necessary that the articles be immediately in view at the time of sale, though they must then be in the power of the sheriff and where bidders may inspect them.<sup>1</sup> The sale should be made where the goods are: the articles must be pointed out and disposed of separately to an amount sufficient to satisfy the execution.<sup>2</sup> But leasehold property need not be sold on the premises.<sup>3</sup>

The sheriff has a reasonable discretion in adjourning the sale.<sup>4</sup> He may sell the goods after the return day, and even after he has gone out of office, without a *venditioni exponas*.<sup>5</sup>

*Who may purchase.*—The plaintiff may purchase at the sale,<sup>6</sup> in which case he need not pay for the goods, unless the price exceed his demand, when he merely pays the surplus.<sup>7</sup> And the plaintiff purchasing is fixed, under the principle of *caveat emptor*, for the amount of his bid, though his judgment, &c., is afterwards set aside, and he is bound to the sheriff for its payment.<sup>8</sup>

A constable cannot lawfully purchase at his own sale, and one deputed by him to make the sale is subject to the same disability: but where the constable personally attends and superintends the sale, and employs a person merely as a crier, the latter may purchase at the sale.<sup>9</sup> Such purchase, however, would be only voidable and not void, except in case of actual fraud; and where the proceeds of such sale are applied to the debt of the defendant, he cannot take advantage of the illegality except by claiming a resale, or demanding the property after tendering the purchase-money.<sup>10</sup> Where the auctioneer himself was the sole bidder, the validity of the sale might be affected if he were the officer intrusted with the writ; but not where he was a crier only, and the sale was conducted under the direction of a deputy marshal holding the writ.<sup>11</sup>

*Misconduct of purchaser.*—If the crier, who became the purchaser, make representations which, as is alleged, caused the property to be struck down at a price much below its actual value, the fraudulent intent of the buyer is a question of fact for the jury, not of law for the court.<sup>12</sup>

*Delivery of goods.*—Suffering the property to remain in the hands of the defendant after the sale, is not a badge of fraud;<sup>13</sup> provided it be left under such a contract of bailment as would in law protect it from the bailee's creditors if he had never been the owner of it.<sup>14</sup> So where the purchaser made the defendant his agent

<sup>1</sup> *Klopp v. Whitmoyer*, 7 Wright 219. *Purd. Dig.* 446, pl. 100–2. *Post. Sect.*

<sup>2</sup> 8 Johns. 333.

<sup>3</sup> *Sowers v. Vie*, 2 Harris 99.

<sup>4</sup> 5 Johns. 345.

<sup>5</sup> *Dorrance v. Commonwealth*, 1 Harris 163, per Rogers, J.; *Beale v. Commonwealth*, 7 Watts 186; *Fittler v. Patton*, 8 W. & S. 455; *McMichael v. McDermott*, 5 Harris 353; 4 Wheat. 503; *Salk*. 323; 2 *Ld. Raym.* 1072.

<sup>6</sup> *Ld. Raym.* 251.

<sup>7</sup> 19 Johns. 84. With regard to real estate, see Act of 20th April 1846,

IV.

<sup>8</sup> *Piper v. Martin*, 8 Barr 211.

<sup>9</sup> *Crook v. Williams*, 8 Harris 342.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Swires v. Brotherline*, 5 Wright 135; *Brotherline v. Swires*, 12 Wright 68.

<sup>12</sup> *Brotherline v. Swires*, 12 Wright 68.

<sup>13</sup> *Lover v. Mann*, 2 Am. L. J. 95; *Walter v. Gernant*, 1 Harris 515.

<sup>14</sup> *Dick v. Cooper*, 12 Harris 217; s. c., 2 Grant 431.

and the business was carried on as before, under the old sign and trade-mark, it was held that the sale was legal notice of a change of property, and no correspondent change of possession and of the *indicia* of ownership were needed to complete the effect.<sup>1</sup> It is for the jury to determine whether there is actual fraud in such cases.<sup>2</sup>

And if the defendant be in fact the real purchaser, and the nominal purchaser falsely alleges at the time of sale his intention of leaving the goods with the defendant as an act of benevolence, or of selling them again for the benefit of creditors, by which the bystanders are induced not to bid, it is a fraud, and the property remains in the defendant subject to execution. The declarations of the bystanders, at the time of the sale, are evidence as part of the *res gestæ*.<sup>3</sup>

In an execution against one of two partners, the sheriff cannot deliver to the purchaser any of the partnership goods: but can sell only the contingent interest of the debtor partner in the stock and profits, after settlement of the partnership accounts and payment of the partnership debts.<sup>4</sup> But where, after the sale, the sheriff retained the possession of the goods until the bid was paid, and then refused to deliver them to the purchaser, who was plaintiff in the execution and who offered indemnity, but delivered possession of the store and goods to the person claiming to be the partner, against whom the purchaser afterwards established his title to the goods, the sheriff was liable to such purchaser for the value thereof.<sup>5</sup>

Where the officer, having received the purchase-money after the sale, went away leaving the purchaser in the house with the goods, and the latter was enticed out of the house and the door locked upon him, the officer had made such a delivery as to relieve him from liability, and trover would not lie on his declining to deliver the goods when afterwards requested, on the ground that they were not in his possession: had the purchaser requested the officer to remain while he went for assistance it would have been his duty to do so.<sup>6</sup>

*Payment.*—Where a promissory note was taken from the purchaser in payment for the goods, it may, as respects the liability of the officer, be treated as money.<sup>7</sup> A sheriff who accepts the notes of the purchaser at a sale, instead of cash, has no power to assign them in payment of his private debt: the parties interested may follow the fund, and reclaim it in the hands of such assignee, with notice, and are not bound to look to the sheriff's sureties for their indemnity: notice to the attorney and agent of such assignee, of the consideration of the notes, is notice to the principal.<sup>8</sup>

Where several execution-creditors agree that the sheriff shall sell

<sup>1</sup> *Lothrop v. Wightman*, 5 Wright 297.

<sup>2</sup> *Van Reed v. Sorin*, D. C. Phila., March 1849. See *Gilbert v. Hoffman*, 2 Watts 66; *Wier v. Hale*, 3 W. & S. 285; *Smith's Appeal*, 2 Barr 331; and *ante*, pp. 791-3.

<sup>3</sup> *Walter v. Gernant*, 1 Harris 515.

<sup>4</sup> *Deal v. Bogue*, 8 Harris 228; *Rein-*

*heimer v. Hemingway*, 11 Casey 432.

<sup>5</sup> *Patterson v. Anderson*, 4 Wright 359.

<sup>6</sup> *Spear v. Alexander*, D. C. Phila., 2 Phila. Rep. 89.

<sup>7</sup> *Seitzinger v. Steinberger*, 2 Jones 379.

<sup>8</sup> *Reed's Appeal*, 10 Casey 207.

the defendant's goods upon credit, the priority of lien among them will not be disturbed.<sup>1</sup>

*Effect of sale.*—The debtor's liability for the debt ceases on the return day of the writ, to the extent of the proceeds of the sale: no matter how the plaintiff be delayed in obtaining the fund, provided the defendant has not aided in such delay, his debt is paid, and his liability for interest on the amount of such proceeds must cease.<sup>2</sup> And the principle that in judicial sales there is no warranty, is applicable to sales of personal as well as real property: hence a judgment is satisfied by a levy and sale of goods to its amount under a *fi. fa.*, although the title of the plaintiff in the execution, who was the purchaser at the sale, be subsequently defeated in an action of replevin.<sup>3</sup>

. And where the plaintiff purchased at a sale under his own judgment, he is, under the principle of *caveat emptor*, fixed for the amount of his bid and bound to the sheriff for its payment, though his judgment, &c., was afterwards set aside.<sup>4</sup>

*Purchaser's title.*—The principle that in judicial sales there is no warranty applies equally to judicial sales of chattels and of land.<sup>5</sup> Such a sale passes title to personal property, although the judgment upon which the execution issued should afterwards, in a contest as to the distribution of the proceeds, be decided to be invalid.<sup>6</sup> But a sale to the plaintiff, upon a satisfied judgment, is void, and confers no title.<sup>7</sup> So in case of a void judgment.<sup>8</sup> If the writ is irregular the sale is void. Thus an execution issued by one justice on the transcript of another justice in the same county, who was at the time in commission, and acting in his office, is wholly void and not merely voidable, and a levy and sale thereunder passes no title in the goods sold.<sup>9</sup> So where a judgment before a justice has been appealed from, and the execution revoked by the justice, the constable is a trespasser if he goes on with the sale, and the purchaser takes no title; and the justice is the proper person to determine whether the appeal was regularly taken; if he allows it, the constable cannot refuse to recognise it on the ground that the justice committed an error.<sup>10</sup> The purchaser's title is not vitiated by the refusal of the constable to appraise and set off under the Exemption Law.<sup>11</sup>

Goods sold by a constable under an execution are protected from a sale under an execution in the hands of the sheriff, though the latter execution were first delivered, if the sheriff had made no

<sup>1</sup> Fletcher's Appeal, S. Ct., 17 Leg. Int. 300.

<sup>2</sup> Strohecker v. Farmers' Bank, 6 Watts 100.

<sup>3</sup> Freeman v. Caldwell, 10 Watts 9. See Miller v. Fitch, 7 W. & S. 366; Boas v. Updegrove, 5 Barr 519; Hunt v. Bredding, 12 S. & R. 41.

<sup>4</sup> Piper v. Martin, 8 Barr 211.

<sup>5</sup> Freeman v. Caldwell, 10 Watts 10, per Gifford, C. J. See Miller v. Fitch,

7 W. & S. 366; Boas v. Updegrove, 5 Barr 519. And see *ante*. "Effect of Sale."

<sup>6</sup> Thompson v. O'Hanlon, 6 Watts 492; Piper v. Martin, 8 Barr 206.

<sup>7</sup> Gibbs v. Neeley, 7 Watts 305.

<sup>8</sup> Camp v. Wood, 10 Watts 123.

<sup>9</sup> Hallowell v. Williams, 4 Barr 343.

<sup>10</sup> O'Donnell v. Mullin, 3 Casey 199.

<sup>11</sup> Hatch v. Bartle, S. Ct., 19 Leg. Int. 332.

levy; nor does a knowledge of the fact that the sale was under the second execution impeach the vendee's title.<sup>1</sup>

If the purchaser, though cognisant of the illegality of the sale, or that the goods do not belong to the defendant, only participates in the transaction as purchaser, he is not liable to the owner in trespass.<sup>2</sup> So also when the sheriff sells and delivers possession to the purchaser.<sup>3</sup> From the moment of seizure the property, although left with the owner, is constructively in the possession of the sheriff, and the removing of it by the purchaser is only a completion of the purpose of the original seizure.<sup>4</sup> The remedy in such case is detinue, replevin in the detinet, or trover after a demand and refusal.<sup>5</sup> But where the sheriff made no actual delivery at the sale, and the property was afterwards taken away by the purchaser, there was no such necessary constructive connection between the possession of the sheriff and that subsequently taken by the purchaser as would relieve the latter from liability in trespass to the actual owner.<sup>6</sup>

When the purchaser falsely declares that his purchase shall enure to the benefit of the debtor or his family, he acquires no title; but if such statement be true the declaration will not invalidate the sale.<sup>7</sup>

A sale of partnership property on execution, under a judgment confessed by one partner alone in the name of the firm, and for a partnership debt, will vest a good title to the property in the purchaser.<sup>8</sup> But where under an execution against a single member of a firm his interest in the partnership property is sold, the purchaser acquires no right to the possession of the specific chattels; the remaining partners are entitled to the exclusive possession; such purchaser is only a *quasi* tenant in common with the other partners in the property of the firm so far as to entitle him to an account; but he has nothing to do with the settlement of the partnership concerns; that is the right and duty of the remaining partners, and for that purpose they are entitled to the possession of the partnership property; hence such a purchase gives the sheriff's vendee no right to maintain replevin for the goods sold, as against one who purchased at a subsequent sheriff's sale, under an execution issued against the same partner as sole owner.<sup>9</sup> And even though one of a portion of the owners against whom the writ issued have authority to sell all the shares of the owners of the chattel, a vessel, the sheriff can sell only the interest of the defendants.<sup>10</sup> But those of the owners who were not parties to the writ, might consent that their

<sup>1</sup> *Duncan v. McCumber*, 2 W. & S. 267. See *Duncan v. McCumber*, 10 Watts 215.

<sup>2</sup> *Wurd v. Taylor*, 1 Barr 238; *Talmadge v. Scudder*, 2 Wright 517.

<sup>3</sup> *Talmadge v. Scudder*, 2 Wright 517; *Hammon v. Fisher*, 2 Grant 330.

<sup>4</sup> *Hammon v. Fisher*, 2 Grant 330.

<sup>5</sup> *Ward v. Taylor*, 1 Barr 238; *Talmadge v. Scudder*, 2 Wright 517.

<sup>6</sup> *Talmadge v. Scudder*, 2 Wright 517.

<sup>7</sup> *Dick v. Cooper*, 12 Harris 217; *Dick*

*v. Lindsay*, 2 Grant 431.

<sup>8</sup> *Grier v. Hood*, 1 Casey 430; *Taylor v. Henderson*, 17 S. & R. 456; *Harper v. Fox*, 7 W. & S. 143; *Paxon v. Beans*, C. P. Bucks, 16 Leg. Int. 97; s. c., 3 Phila. Rep. 433.

<sup>9</sup> *Reinheimer v. Hemingway*, 11 Casey 432; *Coover's Appeal*, 5 Casey 9; *Deal v. Bogue*, 8 Harris 228; *Lothrop v. Wightman*, 5 Wright 297; *Smith v. Emerson*, S. Ct., 20 Leg. Int. 263.

<sup>10</sup> *Hopkins v. Forsyth*, 2 Harris 34.

shares should be sold under the writ against the others, and in such case the parties consenting will be estopped from disputing the purchaser's title, and may come in upon the surplus proceeds of the sale.<sup>1</sup> Where a sheriff's sale was void for irregularity, it is nevertheless valid if ratified and confirmed by defendant.<sup>2</sup> Where an attorney purchases at a sale under his client's execution, he does not become *ipso facto* a trustee for his client, but he may be made a trustee at the client's election; such election is a mode of contracting, and therefore must take place between the parties.<sup>3</sup> A sale of bank stock in execution, by the Act of 20th March 1819, is subject to the lien of any debt due by the holder to the bank; and a subsequent sale under such lien divests the title of the first purchaser.<sup>4</sup>

Where the plaintiff, who purchased at the sheriff's sale, had never credited the defendant on his judgment, but had settled his debt in another way, and there was no change of possession, the goods remained liable to execution as the property of the defendant.<sup>5</sup>

The defendant cannot dispute the title of the purchaser of his goods at the sheriff's sale on the ground of fraud upon the plaintiff in the execution, in an arrangement made between the latter and the purchaser.<sup>6</sup>

A sheriff's vendee, with notice, buys exactly what the judgment-creditor can sell; and if he can sell no more than the interest of the debtor, it follows that he stands in the place of the debtor.<sup>7</sup>

*Setting aside sale.*—By the 1st section of the Act of 10th April 1849,<sup>8</sup> any court in Philadelphia county from which the execution or order of sale issued for the sale of personal property, may inquire into the regularity and fairness of the sale at the instance of a party interested by execution, foreign or domestic attachment, or under a general assignment, upon affidavit of circumstances, before delivery of the goods, and if it appears that the sale was so irregular or fraudulent as in the opinion of the court to have produced a sacrifice of the property to the prejudice of such party, the court may set aside such sale, and the same property may be again exposed to sale, as if no such previous sale had been made: *Provided*, when circumstances require, the court may direct an issue to try questions of fact, and to order the sale, in the mean time, of all perishable or changeable goods, the proceeds to be held to abide the result of the trial. This act has since been extended to the whole State, with a proviso giving to a judge at chambers authority in vacation to grant a rule to show cause, returnable to the next session of the court.<sup>9</sup>

To avoid a purchase at a judicial sale, it should appear that the purchaser obtained the property at an under value, and by means

<sup>1</sup> Hopkins v. Forsyth, 2 Harris 34.

<sup>2</sup> Klopp v. Witmoyer, 7 Wright 226.

<sup>3</sup> Downey v. Gerrard, 3 Grant 64.

<sup>4</sup> West Branch Bank v. Armstrong, 4 Wright 278. The lien of the bank attaches on the protest of a note of the stockholder: *Ibid*.

<sup>5</sup> Schott v. Chancellor, 8 Harris 195.

<sup>6</sup> Richards v. Alden, 1 Grant 247.

<sup>7</sup> Reed's Appeal, 1 Harris 479, per GIBSON, C. J.

<sup>8</sup> Purd. Dig. 438, pl. 45, Pamph. L. 597.

<sup>9</sup> Act 10th March 1858, § 1, Purd. Dig. 438, pl. 46, Pamph. L. 91.

of a fraudulent representation.<sup>1</sup> The fraudulent intent of the purchaser is a question for the jury.<sup>2</sup> Good faith requires that the application should be made at the earliest possible moment.<sup>3</sup> Though it was decidedly irregular to set aside the sale without notice to defendant, yet if the latter suffered the second sale to go on without coming before the court, and calling its attention to this irregularity, the court will not set aside the second sale at his instance.<sup>4</sup> The application must be accompanied by an affidavit that notice thereof has been served on all the parties interested, on the defendant, on the purchaser, and on the plaintiff.<sup>5</sup> Mere inadequacy of price will not impeach a sale of personalty, though sometimes a sufficient ground for setting aside a sale of real estate; personal property, fairly advertised, cried, and struck off, must go for what it will bring.<sup>6</sup>

*Return to fieri facias.*—On the return day of the *fi. fa.*, the sheriff may be called upon by rule to return the writ; and if he do not return it, or offer a reasonable excuse, the courts will grant an attachment against him.<sup>7</sup>

A judge has no power to order an execution to be returned before the return day.<sup>8</sup> The mere omission of a constable to return his execution within twenty days, does not fix him for the amount of the debt, if he have sufficient reason for the delay.<sup>9</sup>

*Form of return.*—The return to an execution is made in the sheriff's own name, and also in that of his deputy, and, as has been seen, he will be allowed to make an addition to his return, if the omission has been accidental merely.<sup>10</sup> To a *feri facias* the returns usually made are: first, that he has caused to be made of the defendant's goods and chattels the whole or part of the debt, &c., which he has ready to be paid to the plaintiff; but he need not specify the particular goods taken and sold;<sup>11</sup> secondly, that he has taken goods to a certain amount, which remain in his hands unsold for want of buyers; or, thirdly, "*nulla bona*," or that defendant has no goods and chattels, lands or tenements in his bailiwick whereof he can cause to be made the sum directed, or any part thereof. The return may be special, with the addition that defendant, being an executor or administrator, has wasted the goods of the testator or intestate.<sup>12</sup>

In an action against the sheriff for misappropriating money made

<sup>1</sup> *Dick v. Cooper*, 12 Harris 217; *Dick v. Lindsay*, 2 Grant 431.

<sup>2</sup> *Brotherline v. Swires*, 12 Wright 69; and see cases cited in the opinion of the court.

<sup>3</sup> *Young v. Wall*, D. C. Phila., 1 Phila. Rep. 69.

<sup>4</sup> *Ingersoll v. Sherry*, D. C. Phila., 1 Phila. Rep. 68.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Swires v. Brotherline*, 5 Wright 135; *Brotherline v. Swires*, 12 Wright 68.

<sup>7</sup> *Tidd Pr.* 1017.

<sup>8</sup> *Irons v. McQuewan*, 3 Casey 196.

<sup>9</sup> *Keller v. Clarke*, 6 W. & S. 534.

<sup>10</sup> *Penna. Ins. Co. v. Ketland*, 1 Binn. 499, *ante*, 873, *et. seq.*

<sup>11</sup> *Fitler v. Patton*, 8 W. & S. 455; 6 Taunt. 576. But see *Beale's Executors v. Commonwealth*, 11 S. & R. 299, 304. It is enough to say: "I have levied and made of the goods and chattels of the within-named C. D., deceased, in the hands of A. B., executor within mentioned, to the value of fifty dollars, which money I have ready. The answer of ———, high sheriff:" *Fitler v. Patton*, 8 W. & S. 455.

<sup>12</sup> *Tidd Pr.* 1018.

upon a *feri facias*, which he had returned without a levy, it is not competent for him to prove by parol that a levy was actually made, nor to give in evidence a written levy of the property out of which the money was made, which had remained in his possession until the time of trial.<sup>1</sup> So schedules of property levied on, which were not returned with the writ, are not admissible in evidence for the sheriff to show what was seized under the writ.<sup>2</sup>

In some of the counties in this State it is usual for the sheriffs to return "debt and costs paid," without stating the facts of levy or sale; whether such would be a legal return, if made in proper time, is uncertain; but after a delay of two years it has been held to be unworthy of the name of a regular return, and inconclusive.<sup>3</sup>

A return that the sheriff had paid over the surplus of the proceeds of the sale of a vessel, after satisfying the execution, to one of the owners for himself, and as agent for the others, is not a legitimate part of the return; and the proper remedy of one of the part owners to recover his share is in *assumpsit*, and not by an action for a false return.<sup>4</sup>

If the sheriff has committed a mistake in his return he may apply to the court for leave to amend, which will in general be granted.<sup>5</sup>

The Act of 21st April 1846,<sup>6</sup> which gives enlarged powers to the courts in reference to amendments of sheriff's returns in cases of sales of real estate, has been applied to sales of personal property in Carbon county, with some additional provisions in reference to the sheriff's power to amend his return.<sup>7</sup>

*Payment by sheriff.*—When the sheriff has returned *feri feci*, the party applies to him for payment, and he is immediately responsible to him for the amount;<sup>8</sup> if he refuses, a rule may be obtained upon him after the return day to pay the money into court, and this rule may be enforced by attachment.<sup>9</sup> And such rule may be obtained against an ex-sheriff within two years after the expiration of his term.<sup>10</sup> When he withholds payment he is also liable to an action of debt on the return, or of *assumpsit* for money had and received.<sup>11</sup> The latter action lies also, if he retain more money for fees, &c., than he is entitled to at the suit of the creditor.<sup>12</sup>

A payment by the sheriff of money made on an execution to one of the several plaintiffs discharges the sheriff, unless notified not to pay, and he cannot maintain a suit to recover it back for the use of the others.<sup>13</sup> He is liable if he pays it to plaintiff's attorney after notice of the revocation of his authority.<sup>14</sup>

<sup>1</sup> McClelland v. Slingluff, 7 W. & S. 134; Kintzing v. McElrath, 5 Barr 467.

<sup>2</sup> McElrath v. Kintzing, 5 Barr 336.

<sup>3</sup> Weidman v. Weitzel, 13 S. & R. 96.

<sup>4</sup> Hopkins v. Forsyth, 2 Harris 34.

<sup>5</sup> Vide ante, p. 873, et seq.

<sup>6</sup> Purd. Dig. 449, pl. 125, Pamph. L.

<sup>7</sup> Act 1st March 1861, Pamph. L. 83.

<sup>8</sup> Scott v. Greenough, 7 S. & R. 200.

<sup>9</sup> Act 16th June 1836, § 28, Purd. Dig. 189, pl. 6, Pamph. L. 793.

<sup>10</sup> Ibid. The sheriff may keep the money until the return day: Fisher v. Allen, D. C. Phila., 2 Phila. Rep. 115.

<sup>11</sup> 3 Johns. 183; Com. Dig. "Execution," C. 7.

<sup>12</sup> Starkie 345.

<sup>13</sup> Lazarus v. Follmer, 4 W. & S. 9.

<sup>14</sup> Irwin v. Workman, 3 Watts 357.

He cannot apply it to a debt due himself from the plaintiff;<sup>1</sup> nor where he has paid it to the wrong person can he, in an action against him by the plaintiff, set up in defence, that he holds a promissory note of the plaintiff.<sup>2</sup>

If he chooses, the sheriff may himself apply the proceeds of the sale to the execution; but in doing so he incurs the risk of mistakes. Thus, if he pays the plaintiff before the return day, or permits him to purchase the goods, he is liable to a subsequent execution-creditor in case the writ is set aside by the court; and a decree of the court sanctioning the payment will not protect him, unless the money has been paid into the court.<sup>3</sup> So if, after the levy, a rule was taken to show cause why the judgment should not be opened, he is liable, if he apply the proceeds to a subsequent execution, since such rule does not stay proceedings without an order to that effect.<sup>4</sup> So he should give the landlord time to make his claim, and a payment to the plaintiff in the execution, the next day after the sale, and ten days before the return day, is too soon, and renders him liable to the landlord.<sup>5</sup> Where, having paid the money to the plaintiff's attorney, the sheriff lost his receipt, and paid it over again, his personal representatives having found the receipt, may recover the money back.<sup>6</sup> So, if he has paid the plaintiff more than he is entitled to, he may recover it back in an action.<sup>7</sup> If he by mistake applies the money to a junior execution, when he should have applied it to a senior writ, he cannot recover it back, although he has thus made himself liable to pay it likewise to the senior execution-creditor;<sup>8</sup> nor is the party, receiving it in good faith, liable to the senior execution-creditor.<sup>9</sup>

It is at his own risk, then, that the sheriff distributes the proceeds of an execution before the return day.<sup>10</sup> In practice he usually takes that risk, and where there are no conflicting claims, it is very well to avoid the delay and expense of paying the money into court. But this will not excuse him if he commit a blunder, however unintentional. All the cases agree, that when he has several writs against the same person, he cannot safely pay one plaintiff before the return day, nor, perhaps, for some days after, except on notice to the others and with their assent. The junior has until that time to contest the right of the senior to the fund, and the sheriff has no right to prefer his antagonist. And when the sheriff has notice of an adverse claim, he cannot safely pay even after the return day, but should pay into court or force the claimants to rule him to do so.<sup>11</sup> If he has any doubt as to the right of the plaintiff to receive the money, he pays it into court and thereby discharges himself from responsibility; or if a third person claims a right to the money, he may rule the sheriff to pay it into court, and when this is ordered,

<sup>1</sup> *Miles v. Richwine*, 2 Rawle 199.

<sup>2</sup> *Irwin v. Workman*, *ubi supra*.

<sup>3</sup> *Williams's Appeal*, 9 Barr 267.

<sup>4</sup> *Spang v. Commonwealth*, 2 Jones 358.

<sup>5</sup> *Fisher v. Allen*, D. C. Phila., 2 Phila. Rep. 115.

<sup>6</sup> *Bradford v. White*, 1 Phila. Rep. 26.

<sup>7</sup> *Longenecker v. Zeigler*, 1 Watts 252; s. c. *Ibid.* 302.

<sup>8</sup> *Urie v. Johnson*, 3 Pa. R. 221.

<sup>9</sup> *Diechman v. Northampton Bank*, 1 Rawle 54.

<sup>10</sup> 1 Pet. C. C. R. 243.

<sup>11</sup> See the cases collected in *Williams's Appeal*, 9 Barr 267.



such person may assert his right to the money or any part of it, and the court will in its discretion determine these contested claims, upon a rule to show cause.<sup>1</sup>

Where the sheriff paid one execution-creditor, taking a bond of indemnity, and the fund was afterwards awarded to another execution-creditor, it was held in an action on the bond, that the decree of distribution, unappealed from and unreversed, was conclusive, and the right of the successful creditor to the money awarded him could not be again examined in such collateral action: and further that a recital in the bond, that the money was made at the suit of the obligor, would not estop the sheriff from suing on the bond after he had been compelled to pay the fund to another creditor.<sup>2</sup>

*Payment into court.*—The money may be paid into court by the sheriff for his own protection, or the court may order him to do so upon the application of a claimant. The practice is not to order the money into court, except upon application of a lien-creditor who shows some reasonable ground to dispute the right of the execution-plaintiff: a party whose execution came into the sheriff's hands after the sale has no such right.<sup>3</sup>

By the 86th section of the Act of 16th June 1836,<sup>4</sup> it is provided that in all cases of disputes concerning the distribution of the proceeds of sales under execution, the court from which the writ issued shall have power, after reasonable notice given, either personally or by advertisement, to hear and determine the same, according to law and equity. Under the extensive powers conferred by this act, the courts have adopted the practice of referring such disputes to an auditor, appointed *pro hac vice*, who calls the claimants before him, examines their claims, and reports the facts and the proper mode of distributing the fund, to the court. As the act applies to the proceeds of both real and personal estate sold under execution, and as

<sup>1</sup> See *Harrison v. Waln*, 9 S. & R. 318.

<sup>2</sup> *Noble v. Cope*, 14 Wright 17.

<sup>3</sup> *Stinson v. McEwen*, D. C. Phila., Saturday, April 8th 1848. Motion for a rule on the sheriff to pay money into court. *Per curiam*. The money in the hands of the sheriff is the proceeds of personal property. It is our practice in such cases never to order the money into court unless upon the application of some one who has a lien upon it, and who shows some reasonable ground to dispute the right of the plaintiff upon whose process it was made. The applicant here is an execution-creditor, but his execution was not placed in the hands of the sheriff until after the sale. The counsel for the applicant supposes that, by virtue of his execution, the sheriff could take any current coin or bank notes in his possession belonging to defendant, and that he, therefore, stands in the position of a party having a lien. (Act of June 16th 1836, §§ 24, 85, *Purd.* 445.) However, the money

in the sheriff's hands in no case specifically belongs to any party, so as to be subject to execution. The plaintiff in an execution, or the defendant as to any surplus, has no property in the particular coin or bank notes the sheriff may have received on the sale of the goods: *Turner v. Fendall*, 1 Cranch 134. By the proviso to the 24th sec. of the act of 16th June, 1836, the sheriff is prohibited from taking or retaining "any money which shall have been levied by him, at the suit or instance of the defendant, upon any other execution." The same reason applies to money belonging to the defendant in his hands made upon an execution against him. Such money has been often held not to be subject to an attachment. *Ross v. Clarke*, 1 Dallas 355; *Fretz v. Keller*, 2 W. & S. 397; *Riley v. Hirst*, 2 Barr 347.

Motion refused.

<sup>4</sup> *Purd. Dig.* 446, pl. 103, Pamph. L. 777.

the practice before auditors is the same in both cases, we shall reserve the discussion of this subject till we come to treat of the distribution of the proceeds of real estate.<sup>1</sup>

The fund must be paid into court before a valid decree of distribution can be made; and the sheriff paying under a decree where the fund is not in the hands of the court, will not be protected by such decree.<sup>2</sup>

*Distribution.*—The fund being in court, is to be distributed among those claimants who are by law entitled to it. The manner in which the rights of claimants are ascertained, is the same whether the fund arose from the sale of personal estate or land, and will, for the sake of convenience, be explained at large under the latter branch of the subject.<sup>3</sup> But the principles which govern the distribution of the proceeds of a sheriff's sale of personal property, are fundamentally different from those which control the distribution of the proceeds of real estate; the chief ground of difference being that the former is bound by the execution, and the latter by the judgment. These principles will be briefly discussed here, though the topic is rather more appropriate to a treatise on the law of personal property than to a book of practice.

The questions most frequently arising upon the distribution of the proceeds of a sheriff's sale of personalty are those which relate to—  
1. Claims against the fund which have a preference by Act of Assembly. 2. Contests between different execution-creditors of the defendant. 3. Disputes between separate creditors of the defendant, and creditors of the partnership of which he was a member.

*Preferred claims.*—By various Acts of Assembly, preferences are established in favor of certain classes of creditors, in the distribution of the proceeds of sheriff's sales of personal property. These will be here considered in turn, after which we shall explain the questions ordinarily arising between creditors as to the right to the proceeds.

*The widow's claim* under the Act of 1851 has been already discussed, and need only be referred to here.<sup>4</sup>

*The landlord's claim* for rent is based upon the 83d section of the Act of 16th June 1836,<sup>5</sup> which enacts that goods and chattels taken in execution upon demised premises are liable for the payment of arrears of rent thereof not exceeding one year,<sup>6</sup> due at the time of the levy. And by the 84th section of the same act the officer is first to pay the arrears of rent out of the proceeds of the sale, and to apply the surplus to the execution: *Provided*, If the proceeds are not sufficient to pay both the rent and the costs of the execution, the landlord shall be entitled to receive the proceeds,

<sup>1</sup> See *post*, Sect. IV., "Practice before Auditors."

<sup>2</sup> Williams's Appeal, 9 Barr 267.

<sup>3</sup> See *post*, Sect. IV., "Practice before Auditors."

<sup>4</sup> See *ante* 820, *et seq.*

<sup>5</sup> Purd. Dig. 438, pl. 47, Pamph. L. 777.

<sup>6</sup> One month and fractions, in case

of coal lands in Schuylkill, Northumberland, Somerset, Carbon, Washington, and Dauphin, by Act of 30th March 1859, § 3, Pamph. L. 318. And four months in case of coal lands in Luzerne, Act 30th March 1859, § 4, Pamph. L. 304. But under both Acts executions upon judgments for rent rank according to *ca.e.*

after deducting so much for costs as he would be liable to pay in case of a sale under distress.<sup>1</sup>

After goods and chattels liable to rent as above have been seized in execution, the plaintiff cannot stay the writ without previously obtaining the written consent of the landlord.<sup>2</sup>

A distinction may be here observed between our act and the English statute upon this subject; in Pennsylvania, the officer must pay the rent out of the proceeds of the sale; whereas, in England, it must be paid before the goods are removed. After a sale by the sheriff, the practice is to take a rule upon him to pay the amount of rent due out of the proceeds.<sup>3</sup> The existence of the rent due being a matter peculiarly within the landlord's knowledge, he is bound to give notice of it to the sheriff in time, to produce as little delay to the execution-creditor as possible. Accordingly, he is bound to give notice of his claim before the execution is returned.<sup>4</sup> Whether he ought to give notice of it in time to enable the sheriff to extend his levy, seems to be undetermined, but the question might under some circumstances be decided against the landlord, and it will always, therefore, be safest for him to give the notice as early as possible. It may likewise under some circumstances become expedient for the execution-creditor to ascertain from the landlord the amount of his claim for rent, and to notify the sheriff of it, so that he may regulate the extent of the levy and sale accordingly. He is in time, however, if the notice reaches the officer *subsequently* to a sale of a portion of the goods, but *before* the return.<sup>5</sup>

The sheriff should give the landlord time to make his claim, and payment to the execution-creditor the next day after the sale, and ten days before the return day of the execution, is too soon and renders the sheriff liable to the landlord.<sup>6</sup>

The liability of the goods to distress is the criterion for determining the landlord's right to participate in the proceeds of their sale under execution.<sup>7</sup> Hence if the goods of the tenant were exempt by law from distress, the landlord cannot claim his rent out of the proceeds of their sale at the suit of a creditor against whom they were not exempted.<sup>8</sup> But a waiver of the Exemption Law in favor of an execution-creditor of the tenant will not give such creditor a preference over the claim of the landlord against the proceeds of the goods.<sup>9</sup>

Goods in the custody of the law under execution or attachment, cannot be distrained.<sup>10</sup> And as goods of a sub-tenant, not recognised

<sup>1</sup> Purd. Dig. 439, pl. 48, Pamph. L. 777. These sections are from the Act of 21st March 1772, § 4, 1 Sm. Laws 371. The proviso to the 84th section was introduced to prevent the absorption of the whole proceeds in costs. See Remarks of Commissioners.

<sup>2</sup> Act 16th June 1836, § 85, Purd. Dig. 439, pl. 49, Pamph. L. 777.

<sup>3</sup> West v. Sink, 2 Yeates 274.

<sup>4</sup> Mitchell's Administrator v. Stewart, 13 S. & R. 295. See the Form of

Notice, Smith's Forms 377, pl. 21.

<sup>5</sup> Allen v. Lewis, 1 Ash. 184.

<sup>6</sup> Fisher v. Allen, D. C. Phila., 2 Phila. Rep. 115.

<sup>7</sup> Commonwealth v. Contner, 6 Harris 447; Commonwealth v. Contner, 9 Harris 266; Moss's Appeal, 11 Casey 162; Rowland v. Goldsmith, 2 Grant 378; Grant's Appeal, 8 Wright 477.

<sup>8</sup> Rowland v. Goldsmith, 2 Grant 378.

<sup>9</sup> Collins's Appeal, 11 Casey 83.

<sup>10</sup> Corbyn v. Bollman, 4 W. & S. 342.

as such by the landlord, are liable to distress for rent due by his superior tenant, although he has paid his rent to such superior tenant, so on execution against goods of the sub-tenant, the landlord's claim for rent against the superior tenant must be paid out of the proceeds.<sup>1</sup> Where, during the tenancy, goods of the tenant were removed openly and in the daytime, and the landlord distrained a part in the place of removal, but did not remove them, he cannot, as against creditors whose execution was issued and levied the day after, claim any portion of the proceeds for rent due.<sup>2</sup>

Rent issuing out of lands and tenements corporeal, or out of these and their furniture, may be distrained for or claimed out of the proceeds of sheriff's sale.<sup>3</sup> But a sum of money payable periodically for the use of chattels, is not rent in any sense of the word, and cannot be claimed by the owner out of the proceeds of a sheriff's sale of such chattels.<sup>4</sup>

Under the Act of 1772, a ground-rent landlord is not entitled to be paid his arrears of ground-rent out of goods on the premises sold by the sheriff, on execution against the owner of the ground in possession.<sup>5</sup>

The landlord entitled to a year's rent out of the proceeds, is the *immediate* landlord of the party whose goods have been sold.<sup>6</sup> But a landlord, after the decease of his tenant, may distrain the goods of a *sub-tenant* on the premises for the rent which accrued previously to the principal tenant's decease, not exceeding in amount the rent of one year.<sup>7</sup>

The landlord is entitled to claim his rent out of the proceeds of an execution levied by a constable.<sup>8</sup> But a justice of the peace has no jurisdiction in an action against the constable, for not paying the landlord's claim out of the proceeds of an execution.<sup>9</sup>

If the sheriff, out of the proceeds of sale under another writ, had paid the landlord a year's rent in advance, according to the terms of the lease, after which the landlord took possession of the demised premises, such payment is not to be disallowed the sheriff in an action against him by a prior execution-creditor whose writ had been postponed through misconduct on the part of the sheriff. The rent being due, and the right of distress perfect, the sheriff could not have withheld it; he is bound to observe only such relations between the landlord and tenant as existed at the time of his payment.<sup>10</sup> But the act contemplates an existing tenancy at the time of sale; if there be no tenancy, there can be no right to distrain, and consequently no equivalent therefor, as provided by the act.<sup>11</sup> Thus, a surrender of the tenancy after levy, but before sale, deprives the landlord of his claim for rent against the proceeds, which, in

<sup>1</sup> McComb's Appeal, 7 Wright 435.

<sup>2</sup> Grant's Appeal, 8 Wright 477.

<sup>3</sup> Mickle v. Miles, 7 Casey 20.

<sup>4</sup> Commonwealth v. Contner, 6 Harris 439.

<sup>5</sup> Pattison v. McGregor, 9 W. & S. 180. *Aliter* when the land itself is sold: Dougherty's Estate, *Ibid.* 189.

<sup>6</sup> Bromley v. Hopewell, 2 Harris 400.

<sup>7</sup> Mickle's Adm'r. v. Mills, 1 Grant 320.

<sup>8</sup> Morgan v. Moodey, 6 W. & S. 333;

Seitzinger v. Steinberger, 2 Jones 379.

<sup>9</sup> *Ibid.*

<sup>10</sup> Commonwealth v. Contner, 9 Harris 266.

<sup>11</sup> Parker's Appeal, 5 Barr 392.

such case, belongs exclusively to the execution-creditors.<sup>1</sup> And a sheriff's sale of the landlord's interest in the land destroys his remedy by distress for arrears of rent, and with it the right to claim money in the sheriff's hands, arising from the sale of personal property of a tenant in possession.<sup>2</sup> But it is not necessary, in all cases, that there should be an existing tenancy at the time of the levy, for the landlord may claim his rent wherever he might have distrained, and in this State the landlord, by the 3th section of the Act of 21st March 1772,<sup>3</sup> may have distress whenever rent is in arrear, and he retains his title, without limitation as to time; therefore, where the tenant had incurred a forfeiture of his lease three years before the levy, six months' rent being then in arrear, the landlord is entitled to be paid the amount in arrear at the time of the forfeiture, out of the proceeds of the sheriff's sale of tenant's goods.<sup>4</sup>

The landlord is entitled to have the rent apportioned, and to claim rent due at the time of the levy, though in the middle of a quarter.<sup>5</sup> And where there were several successive levies, under which the goods were afterwards sold at one sale, the landlord is entitled to his rent up to the date of the last levy, to which there are proceeds applicable.<sup>6</sup> But if the rent be reserved without any deduction on account of taxes, which the tenant covenants to pay, the landlord cannot charge the goods taken in execution with any part of the sum due for taxes;<sup>7</sup> and this, though no rent was actually due.<sup>8</sup> He is not entitled to the rent to the time of sale;<sup>9</sup> and where the tenant had covenanted to pay the taxes, the landlord is not entitled to claim the amount of taxes paid by him after the levy.<sup>10</sup> And where, in a feigned issue between the landlord and an execution-creditor to determine the amount of rent due, credit is asked for the tenant's book-account against the landlord, the latter cannot set off against such account the rent accruing after the levy.<sup>11</sup> The landlord can claim rent payable in advance.<sup>12</sup> And where the rent was payable quarterly in advance, the landlord is entitled to be paid for the whole quarter current at the time of the levy, but not for such portion of the next quarter as would have been payable had the rent not been payable in advance, and the rent due at the beginning of such next quarter been in consideration of past occupation.<sup>13</sup> The rent is to be apportioned either by the contract or by the time of enjoyment, and not in advance of both; hence, where rent was

<sup>1</sup> Greider's Appeal, 5 Barr 422, citing 5 B. & C. 88.

<sup>2</sup> Hampton v. Henderson, 2 Am. L. J. 562. See 4 P. L. J. 282-3.

<sup>3</sup> 1 Sm. Laws. 372.

<sup>4</sup> Moss's Appeal, 11 Casey 162, qualifying Parker's Appeal, 5 Barr 392.

<sup>5</sup> Binns v. Hudson, 5 Binn. 506; Parker's Appeal, 5 Barr 390; Case v. Davis, 3 Harris 80.

<sup>6</sup> Worley v. Meekley, D. C. Phila., 1 Phila. Rep. 398.

<sup>7</sup> Binns v. Hudson, 5 Binn. 506; Wager v. Duke, 2 P. L. J. 297; Case

v. Davis, 3 Harris 80.

<sup>8</sup> Lichtenthaler v. Thompson, 13 S. & R. 158. See Whart. Dig., "Landlord," II. (G.)

<sup>9</sup> Binns v. Hudson, 5 Binn. 506. See West v. Sink, 2 Yeates 274.

<sup>10</sup> Case v. Davis, 3 Harris 80.

<sup>11</sup> Ibid.

<sup>12</sup> Commonwealth v. Contner, 9 Harris 266; Collins's Appeal, 11 Casey 83.

<sup>13</sup> Morris v. Billings, D. C. Phila., 1 Phila. Rep. 464. See Anderson's Appeal, 3 Barr 218.

payable in advance, and the first quarter's rent was so paid, and the sale of the tenant's goods took place during that quarter, the landlord was not entitled to claim any part of the rent for the second quarter; it was not due, and there had been no enjoyment on which to found the allowance.<sup>1</sup>

The landlord is not confined to the current year, or the year immediately preceding the execution, in his claim for rent, but may claim for one year due previously.<sup>2</sup>

If, previously to the levy, the landlord had distrained, and the tenant had replevied, the landlord would be entitled to have out of the proceeds of the sheriff's sale only the amount of rent accruing after the distress.<sup>3</sup> But a postponement of a sale of goods distrained, for a short time, at the request of the tenant, does not, it seems, postpone the distress to an intervening execution.<sup>4</sup> And the postponement of the distress, even where the tenant has waived the Exemption Law in favor of his landlord, will not debar the latter from claiming his rent out of the proceeds of an execution, if the landlord has used reasonable diligence to make the fund within his reach available in satisfaction of the rent.<sup>5</sup>

A sheriff's sale of a lease of coal-mines, in which there is a covenant of re-entry on non-payment of rent, divests the landlord's right of re-entry, and discharges his lien for arrears of rent due at the time of sale; and such arrears are payable out of the proceeds, in preference to miners' and mechanics' claims.<sup>6</sup>

In a contest between the landlord and the execution-creditor of the tenant, as to the distribution of the proceeds of a sheriff's sale of the tenant's goods, the tenant is a competent witness to prove the terms of the demise.<sup>7</sup>

Execution-creditors cannot set up defect of landlord's title against a distress for rent, nor against the landlord's claim for arrears.<sup>8</sup>

*Wages.*—In certain parts of the State, wages of laborers in certain specified employments have, by various Acts of Assembly, a preference in the distribution of the proceeds of sheriff's sales of property, real as well as personal.

The kind of labor, the time within which the wages thereof must have accrued, and the amount of wages entitled to a preference, vary in the different counties. This preference is given to wages of miners, mechanics, and laborers engaged in coal-mining, or in forges, furnaces, rolling-mills, nail factories, machine shops, or foundries, in Schuylkill, not exceeding one hundred dollars,<sup>9</sup> in Berks, Washington, Centre, Somerset, Westmoreland, and Carbon, not exceeding fifty dollars,<sup>10</sup> and in Northumberland, Dauphin, and

<sup>1</sup> Purdy's Appeal, 11 Harris 97.

<sup>2</sup> *Richie v. McCauley*, 4 Barr 475, citing *Ege v. Ege*, 5 Watts 140; *Moss's Appeal*, 11 Casey 162. See *Parker's Appeal*, 5 Barr 390.

<sup>3</sup> *Gray v. Wilson*, 4 Watts 39.

<sup>4</sup> *Kline v. Lukens* D. C. Phila., 4 Phila. Rep. 296.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Wood's Appeal*, 6 Casey 274.

<sup>7</sup> *Collins's Appeal*, 11 Casey 83.

<sup>8</sup> *Northampton County's Appeal*, 6 Casey 305.

<sup>9</sup> Act 14th April 1851, § 10, *Purd. Dig.* 1006, pl. 4, *Pamph. L.* 542.

<sup>10</sup> Act 2d April 1849, *Purd. Dig.* 1006, pl. 1-3, *Pamph. L.* 337.

Lancaster, not exceeding one hundred dollars,<sup>1</sup> all these without limit as to time; to wages not exceeding one hundred dollars, of any miner, laborer, mechanic, or clerk employed in and about coal mining, due for any period not exceeding six months immediately preceding the transfer by execution or otherwise of the coal-mine, or lease, or other property connected therewith in carrying on said business, or preceding the death or insolvency of such employer; in Luzerne,<sup>2</sup> Schuylkill, Northumberland, Somerset, Carbon, Washington, and Dauphin,<sup>3</sup> Columbia and Montour,<sup>4</sup> and in the two last-named counties, also to persons engaged in the mining of iron-ore, or the manufacture of iron;<sup>5</sup> in Centre to wages not exceeding one hundred dollars, without limit as to time, of daily laborers and mechanics for work and labor done by themselves or teams in the employ of persons engaged in mining or manufacturing, and of companies or corporations engaged in mining, manufacturing, or building, such preference to be confined to the proceeds of the real and personal property used and necessary to the operations of mining or manufacturing, &c., as aforesaid;<sup>6</sup> in Montgomery, to wages not exceeding one hundred dollars, without limit as to time, of mechanics, laborers, and operatives employed in the manufacture of cotton or woollen goods, or cloth fabrics of any kind;<sup>7</sup> in Fayette, to wages of laborers in or about any manufacturing establishment due for any period not exceeding six months immediately preceding the death or insolvency of the owner thereof, without limit as to amount; and in case of dissolution by death or otherwise of any partnership, firm, or incorporated company, the preference is given to wages, without limit as to amount, of operatives or laborers, for service performed for any period not exceeding one year;<sup>8</sup> and to wages and salaries, not exceeding one hundred dollars, for labor done and performed within six months immediately preceding the levy, for any person, firm, company, or association in Schuylkill, Bedford, and Blair.<sup>9</sup>

In regard to the degree of preference given to wages the law varies in the different counties. The Acts of 2d April 1849,<sup>10</sup> 14th April 1851, § 10,<sup>11</sup> and 12th May 1857,<sup>12</sup> which embrace Schuylkill, Berks, Washington, Centre, Somerset, Westmoreland, Carbon, Northumberland, Dauphin, and Lancaster, put wages on the footing of rents, as to the manner of collection. Under these acts claims for wages are postponed to the landlord's claim for a year's rent out of the proceeds of personal property sold under execution,<sup>13</sup> and for arrears of rent due at the time of sale when the lease was included

<sup>1</sup> Act 12th May 1857, Pamph. L. 463. 119.

<sup>2</sup> Act 30th March 1859, Pamph. L. 304.

<sup>3</sup> Act 30th March 1859, Purd. Dig. 1006, pl. 7, 1007, pl. 8-12, Pamph. L. 318.

<sup>4</sup> Act 1st May 1861, Pamph. L. 438.

<sup>5</sup> Ibid.

<sup>6</sup> Act 7th March 1860, Pamph. L. 118.

<sup>7</sup> Act 7th March 1860, Pamph. L.

<sup>8</sup> Act 26th February 1861, Pamph. L. 47.

<sup>9</sup> Act 11th April 1862, Pamph. L. 479.

<sup>10</sup> Purd. Dig. 1006, pl. 1-3, Pamph. L. 337.

<sup>11</sup> Purd. Dig. 1006, pl. 4, Pamph. L. 542.

<sup>12</sup> Pamph. L. 463.

<sup>13</sup> Wood's Appeal, 6 Casey 274.

in the sale.<sup>1</sup> And the claims for wages are preferred to the rights of execution-creditors, where the money is raised on a sale of personalty.<sup>2</sup> And such claims are not limited to the fruits of process against personalty.<sup>3</sup> Nor are they confined to the proceeds of personal property at the mines, but extend to the personal estate generally of the employer.<sup>4</sup> But such claims are not entitled to be paid out of the sale of the separate interest of one member of the firm by which the wages, &c., are due.<sup>5</sup> And on a sale of real property they are not entitled to the proceeds in preference to liens of record.<sup>6</sup>

The Act of 30th March 1859,<sup>7</sup> however, expressly makes claims for wages the first lien upon the proceeds of coal-mines, and estates in Luzerne, or of any property owned by the defendant in execution within the county—saving, however, the priority of liens of record, or contracts existing prior to the act—and provides that no mortgage or other instrument creating a lien upon a coal lease, mining right, or mining machinery and fixtures, executed after the passage of the act, shall operate to impair the priority of claims for wages. And the Act of 30th March 1859,<sup>8</sup> applied to Schuylkill, Northumberland, Somerset, Carbon, Washington, and Dauphin, is identical in its provisions and restrictions with that just quoted, except that the lien and preference is confined to the colliery and mining property, and does not cover other property of the execution-defendant. This latter act is now extended to Columbia and Montour, and there covers the mining and manufacture of iron as well as coal mining.<sup>9</sup> The Act of 7th March 1860,<sup>10</sup> confined to Centre, gives the claim for wages a preference over all other debts or claims, except such as were at the time of its passage preferred by existing laws, and also excepting claims under the Mechanics' Lien Law, and this preference is confined to the proceeds of the real and personal property used and necessary in the business in which the wages became due. The Act of 7th March 1860,<sup>11</sup> relating to Montgomery, merely provides that claims for wages shall be paid out of the proceeds in like manner as rents are payable in such cases, but without indicating the degree of preference to be given them. Under a similar provision, in one of the earlier acts, it has been held that on a sale of personalty the landlord's claim for arrears of rent is to be paid before claims for wages;<sup>12</sup> but these latter are to be preferred to the execution-creditors.<sup>13</sup> The Act of 26th February 1861,<sup>14</sup> relating to Fayette, provides that the claims for wages shall be a lien upon the "establishment," and shall be first paid from the proceeds of sale, but the widow's right to retain three hundred dollars, under the Act of 1851,<sup>15</sup> is not to be affected. And the Act of 11th

<sup>1</sup> Wood's Appeal, 6 Casey 274.

<sup>2</sup> Vastine's Appeal, 2 Wright 164; Beatty's Appeal, 3 Grant 213.

<sup>3</sup> Wade's Appeal, 5 Casey 328.

<sup>4</sup> Reed's Appeal, 6 Harris 235.

<sup>5</sup> Beatty's Appeal, 3 Grant 213.

<sup>6</sup> Wade's Appeal, 5 Casey 328;

Johnston's Appeal, 9 Casey 511.

<sup>7</sup> Sects. 1, 2, 3, and 5, Pamph. L. 304.

<sup>8</sup> Sects. 1 and 4, *Purd. Dig.* 1006, pl. 7, 1007, pl. 10, Pamph. L. 318.

<sup>9</sup> Act 1st May 1861, Pamph. L. 438.

<sup>10</sup> Pamph. L. 118.

<sup>11</sup> Pamph. L. 119.

<sup>12</sup> Wood's Appeal, 6 Casey 274.

<sup>13</sup> Vastine's Appeal, 2 Wright 164.

<sup>14</sup> Pamph. L. 47.

<sup>15</sup> Pamph. L. 613, § 5.



April 1862,<sup>1</sup> relating to Schuylkill, Bedford, and Blair, provides that the claims for wages shall be first paid.

*Persons entitled.*—Under the Act of 2d April 1849,<sup>2</sup> all laborers employed by the persons and companies therein named, are entitled to its benefits, whether the wages agreed to be paid are measured by time, by the ton or piece, or any other standard; the laborers included in the act are those who perform with their own hands the contract they make with the employer, and where the nature of the work done requires helpers or assistants in aid of the chief workman, their wages are as much within the protection of the act as those of the principal workman; though the statute limits this protection to persons employed by the proprietors, such necessary helpers or assistants are impliedly employed by them through their agents, the chief or principal workmen, are within the protection of the statute, and are entitled to their wages, not exceeding the limit prescribed by the act, where they have not been paid by their immediate employer.<sup>3</sup>

*Practice.*—Where the acts contain any provision at all on the subject, they agree in requiring notice of the claim to be given to the officer prior to the sale,<sup>4</sup> except the Act of 26th February 1861,<sup>5</sup> relating to Fayette, which permits claims to be presented before distribution of the proceeds. The Act of 11th April 1862<sup>6</sup> requires the officer to give to the persons employed by the defendant notice of the issue of the writ by at least ten handbills, written or printed, posted in public places in the neighborhood, at least ten days before the sale, requiring them to present their claims to him prior to the said sale. In general the claims, subject to any legal objection as to their validity or amount, are to be paid by the officer in the same manner as rents are payable. There is no general provision for ascertaining the amount actually due on claims for wages, but by analogy to landlord's claims it is probable that the courts would award a feigned issue between the claimants and the execution-creditors in cases of dispute.<sup>7</sup> The lien of wages upon real estate will be discussed hereafter.<sup>8</sup>

*Miscellaneous. Liens.*—The captain of a steamboat has no lien for advances; and the sheriff has no right to satisfy such claim out of the proceeds of the sale.<sup>9</sup> Though an attorney has a lien for compensation upon money collected, or papers intrusted to him, he cannot maintain a claim upon the proceeds of an execution paid into court as against his client, the execution-plaintiff. Possession is indispensable to such lien. Not being an owner, he cannot claim as distributee.<sup>10</sup>

A judgment-creditor, whose lien is on the realty, cannot look to

<sup>1</sup> Pamph. L. 479.

<sup>2</sup> Pamph. L. 337. See *ante*, 926-7.

<sup>3</sup> Seiders's Appeal, 10 Wright 57.

<sup>4</sup> See Act 2d April 1849, § 3, Purd. Dig. 447, pl. 113, and 1006, pl. 3, Pamph. L. 337.

<sup>5</sup> Pamph. L. 47.

<sup>6</sup> Pamph. L. 479.

<sup>7</sup> See "Landlord's Claim," *ante*, 922.

<sup>8</sup> See *post*, Sect. IV., "Distribution of Proceeds."

<sup>9</sup> Hopkins v. Forsyth, 2 Harris 34.

<sup>10</sup> Dubois's Appeal, 2 Wright 231.

the fund raised by the sale as personalty, of machinery severed from the freehold.<sup>1</sup>

*Distribution among execution-creditors.*—The general rule, where there are several executions levied on goods, is that the proceeds are to be applied to the writs in the order of time in which they came into the sheriff's hands.<sup>2</sup> And so where they are issued the same day, and delivered to the sheriff on different periods of the day.<sup>3</sup> And in order that this may be done the sheriff is required to endorse upon each *feri facias* the day of the month, the year, and the hour of the day, when it was received.<sup>4</sup>

But a junior execution-creditor may contest the right of the prior execution to the proceeds, on various grounds. Thus a fraudulent use of the prior execution to obtain security for the debt or to cover up the debtor's property from other creditors, will cause the prior execution to be postponed to subsequent ones in the distribution.<sup>5</sup> And the defendant, in an execution on a judgment before an alderman, cannot enter an appeal for the sole purpose of postponing such writ in favor of a subsequent execution on a judgment confessed in another court: the fact of fraud in such case may be tried upon a feigned issue or may be referred to an auditor, and if the fraud is established, the court will award the proceeds to the first execution.<sup>6</sup> So the junior creditor may attack the judgment upon which the prior writ issued, on the ground of fraud or want of consideration.<sup>7</sup> Though where an insolvent person has two creditors equally meritorious, a judgment confessed to one to secure his debt is not fraudulent.<sup>8</sup> But the junior execution-creditor cannot attack either the judgment or execution on the ground of error or irregularity, as that the writ was made returnable to a wrong return day, or issued contrary to an agreement between the plaintiff and defendant, or the judgment was erroneously entered, or that the plaintiff had afterwards issued an attachment-execution.<sup>9</sup> No one but the execution-defendant or his legal representatives can do this, nor can he do it in a collateral action, or in any manner other than by taking out a writ of error, or by making a direct application to the court in which the judgment is entered or from which the execution issued, to vacate it or set it aside.<sup>10</sup>

It has already been seen that a waiver of the benefit of the Exemption Law in favor of a junior execution creditor does not give him any preference, in respect to the proceeds of the exempted property, over a prior execution in favor of which the exemption was

<sup>1</sup> Hutchman's Appeal, 3 Casey 209.

<sup>2</sup> Lytle v. Mehaffey, 8 Watts 275; Long's Appeal, 11 Harris 300.

<sup>3</sup> Ulrick v. Dreyer, 2 Watts 303.

<sup>4</sup> Act 16th June 1836, § 40, Purd. Dig. 437, pl. 41, Pamph. L. 768. This is confined to writs of *feri facias*, and is not applicable to a foreign attachment: Long's Appeal, 11 Harris 400.

<sup>5</sup> This class of cases has been already considered: *Vide ante*, 891-3.

<sup>6</sup> Davis v. Ward, D. C. All, 1 Phila. Rep. 216.

<sup>7</sup> Roemer v. Denig, 6 Harris 482; Lytle v. Mehaffey, 8 Watts 275.

<sup>8</sup> Greenwalt v. Austin, 1 Grant 169. Whether a judgment is or is not fraudulent is a question of law not of practice, and it would be inappropriate to discuss it here. The reports abound in decisions on the subject.

<sup>9</sup> Phila. Loan Co. v. Amies, 2 Miles 292; Lowber's Appeal, 8 W. & S. 387; Roemer v. Denig, 6 Harris 482.

<sup>10</sup> Lowber's Appeal, 8 W. & S. 387.

not waived; such waiver simply redounds to the benefit of the prior execution.<sup>1</sup>

So where the plaintiff in the junior execution indemnified the sheriff against a claimant of the property levied on, the other execution-creditors not having indemnified him, the last execution-creditor was held not to be entitled to any preference by reason of the indemnity, but the proceeds were distributed according to priority.<sup>2</sup> So where a junior execution-creditor contested the right of a stranger claiming the goods under the Interpleader Act, the first execution-creditor taking no part in the proceedings, the proceeds were nevertheless awarded to the first writ.<sup>3</sup>

Under the equitable powers of the court in matters of distribution, a surety who had the prior execution against his principal, but was himself insolvent, was not allowed to receive the fund to the prejudice of a subsequent execution, issued upon the debt for which he was surety, but the proceeds were distributed to the latter.<sup>4</sup>

By the 39th section of the Act of 16th June 1836, no writ of *feri facias* or other writ of execution shall bind the property or the goods of the person against whom such writ of execution is sued forth, but from the time such writ shall be delivered to the sheriff, under-sheriff, or coroner, to be executed.<sup>5</sup> A *feri facias* binds all the defendant's personal property in the bailiwick, from the time it is put in the sheriff's hands.<sup>6</sup> But there is nothing in the act which implies that the title of the creditors depends upon the time when the goods were bound: and the proceeds of sale under three writs must be appropriated to the first which came to the hands of the sheriff, although the property sold was acquired by the debtor after the delivery to the sheriff of the first two executions, and prior to the delivery of the third.<sup>7</sup> And where a second levy, subject to the first, specified property not enumerated in the first, evidence is inadmissible to show that such property was acquired after the levy under the first writ, if it was acquired before the return day of that writ.<sup>8</sup> So where the sheriff returned "levied and sold part of the property," and on a subsequent execution he returned that he sold the other part, for another sum, the first execution is entitled to the proceeds of both sales.<sup>9</sup> So where the property sold at the second sale had been claimed by a stranger, and the second execution-creditor contested the claim in a feigned issue under the Interpleader Act, the first execution-creditor taking no part in the proceedings, the proceeds were awarded to the first writ.<sup>10</sup>

<sup>1</sup> *Ante*, 819-20.

<sup>2</sup> *Girard Bank v. Norristown Railroad*, 2 Miles 447; *Schuykill County's Appeal*, 6 Casey 358.

<sup>3</sup> *Childs v. Dilworth*, 8 Wright 123.

<sup>4</sup> *Worrall's Appeal*, 5 Wright 524.

<sup>5</sup> *Purd. Dig.* 437, pl. 40, Pamph. L. 768. At common law goods and chattels were bound by the award of the execution; and if afterwards they were sold *bonâ fide*, they might be taken in execution. See *Com. Dig.* "Execution," D. 2. This was altered in Eng-

land by the Stat. 29 Car. II., 3, and in Pennsylvania by the Act 21st March 1772, § 4, 1 Sm. Laws 390, which is reenacted in the Act of 1836, almost *ipsisimis verbis*.

<sup>6</sup> *Earl's Appeal*, 1 Harris 485.

<sup>7</sup> *Shafner v. Gilmore*, 3 W. & S. 438; *Wilson's Appeal*, 1 Harris 426.

<sup>8</sup> *Wilson's Appeal*, 1 Harris 426.

<sup>9</sup> *McCahen v. Bennett*, 1 Phila. Rep. 22.

<sup>10</sup> *Childs v. Dilworth*, 8 Wright 123.

After a *fi. fa.* issued, one who held collaterals in trust for the execution-creditor, and who was at the same time assignee of the debtor, received money on account of the collaterals: a subsequent execution-creditor cannot compel the application of that money to the debt thereby secured, but the assignee may retain it for the general creditors, subject to the obligation to satisfy any deficiency under the execution.<sup>1</sup>

The loss of priority by an execution-plaintiff on account of his own misconduct, in delaying unduly the execution of the writ, has already been discussed.<sup>2</sup> Delay caused by the action of the court will not prejudice him. Thus, a judge has no power to order an execution to be returned before the return day, such order being void for want of power to make it; and therefore, where executions had been returned by the sheriff in pursuance of such order, and the order was rescinded before the return day, and the executions redelivered to the sheriff before the sale of the goods, the priority of the executions over subsequent executions issued before the order was made remains undisturbed.<sup>3</sup> Where the sheriff was directed first to exhaust the personal property, and then resort to the real estate of the defendants, but by mistake first levied on and advertised the real estate, and then learning that there was personal property, levied on and sold it: the prior levy on the real estate was not an abandonment of the lien of the execution on the personal property.<sup>4</sup>

After a sale of goods under two writs upon separate judgments, where the writ issued upon the first judgment came first to the sheriff's hands, the plaintiff cannot, even with defendant's consent, have the proceeds applied to the second judgment so as to keep alive the lien of the first upon defendant's land, to the prejudice of an intermediate lien.<sup>5</sup>

*Partnership property.*—Where executions against separate members of a partnership and others against the firm, were in the sheriff's hands at the same time, prior to a levy and sale of the partnership property, a conflict often arises between the separate creditors and the firm creditors as to the right to the proceeds.

In such case the general rule is that the partnership creditors are to be first paid out of the proceeds, without regarding whether their executions were or were not prior to those of the separate creditors;<sup>6</sup> and the surplus, if any, is to be distributed among the separate creditors *pro rata*, paying due regard to the interest of their respective debtors in the property sold.<sup>7</sup> But a judgment entered upon a joint bond executed by the partners, is not necessarily for a

<sup>1</sup> Smith's Appeal, 2 Barr 331.

<sup>2</sup> *Vide ante*. 893.

<sup>3</sup> Irons v. McQuewan, 3 Casey 196.

<sup>4</sup> Childs v. Dilworth, 8 Wright 123.

<sup>5</sup> Dean v. Patton, 13 S. & R. 341; Cathcart's Appeal, 1 Harris 422. See Hunt v. Bredding, 12 S. & R. 37; Wood v. Vanarsdale, 3 Rawle 40.

<sup>6</sup> Rex v. Lomman, C. P. York, 3

Phila. Rep. 287; Church v. Griffiths, 1 Am. L. J. 254; Coover's Appeal, 5 Casey 9; King's Appeal, 9 Barr 124. And the rule is the same in regard to proceeds of real estate purchased and held for partnership purposes: Overholt's Appeal, 2 Jones 222.

<sup>7</sup> Rex v. Lomman, C. P. York, 3 Phila. Rep. 287.

partnership debt, and the execution on such judgment will not be entitled to preference unless that fact is shown *aliunde*.<sup>1</sup>

But where one of the two partners contributed the whole of the capital, under a stipulation that he should retain the exclusive ownership of the whole until the other partner had contributed a specified portion of the profits, and this was never done, the execution-creditors of the firm have no preference over prior executions issued by separate creditors of the partner who contributed the capital.<sup>2</sup> So in case of a secret partnership, an execution on a separate judgment against the one carrying on the business publicly in his own name, is to be paid out of proceeds of partnership property, in preference to a subsequent execution against the two partners as a firm.<sup>3</sup> And partnership creditors who have not obtained judgment and issued execution, have no such preference over separate creditors on whose writs the sale was made.<sup>4</sup>

The return should indicate that the property sold belonged to the partnership, and if there is a doubt upon this point the fact should be ascertained under the direction of the court.<sup>5</sup> Where writs of each class are in the sheriff's hands before the sale, he should sell under those against the partnership.<sup>6</sup>

It is often said that the claim of partnership creditors to preference in the distribution must be worked out through the equities of the partners themselves, of whom each, so long as he exercises dominion over the property, has a right to insist on its application to partnership liabilities before it be appropriated to the individual debts of the partners;<sup>7</sup> and if backward in protecting their rights, a partner may be compelled by them to allow his name to be used in equitable proceedings to enforce those rights: but when neither he nor they interpose to arrest proceedings at law, the effect of which was to dissolve the partnership and extinguish the joint stock, they cannot afterwards intervene in the distribution of the proceeds of partnership assets sold by the sheriff under executions of joint creditors.<sup>8</sup>

But where the partners have themselves separated the goods, as by a dissolution and division, or by sale severally made, or by separate assignments each assented to by the other partner, there is nothing through which the equities of creditors can work, and the above rule does not apply.<sup>9</sup> In such case an execution against the firm is not entitled to preference over a prior execution against a separate partner.<sup>10</sup> And the same effect is produced where the several interests of the partners are sold under separate executions.<sup>11</sup> That is, if the sale has actually been effected and the property changed before the execution issued against the firm; but a mere

<sup>1</sup> Snodgrass's Appeal, 1 Harris 471.

<sup>2</sup> Taggart v. Keys, D. C. Phila., 3 Phila. Rep. 96; s. c., S. Ct., 16 Leg. Int. 108; York County Bank's Appeal, 8 Casey 446.

<sup>3</sup> Brown's Appeal, 5 Harris 480.

<sup>4</sup> Backus v. Murphy, 3 Wright 397.

<sup>5</sup> Vandike's Appeal, 5 Harris 271.

<sup>6</sup> Rex v. Lomman, C. P. York, 3 Phila. Rep. 287.

<sup>7</sup> Coover's Appeal, 5 Casey 9.

<sup>8</sup> Backus v. Murphy, 3 Wright 397.

<sup>9</sup> Coover's Appeal, 5 Casey 9; McNutt v. Strayhorn, 3 Wright 269; Cope's Appeal, Ibid. 284.

<sup>10</sup> Cope's Appeal, *ubi supra*.

<sup>11</sup> Doner v. Stauffer, 1 Pa. R. 205; Baker's Appeal, 9 Harris 76; Coover's Appeal, 5 Casey 9.

levy on the separate interests of each partner will not affect the rights of a subsequent execution against the firm, which came to the sheriff's hands before he had sold under the separate writs.<sup>1</sup>

A sale under an execution on a judgment confessed by a single partner in the name of the firm and for a partnership debt, divests the whole interest of the partners, and the proceeds will be applied first to executions against the partnership;<sup>2</sup> and though such a judgment might perhaps have been set aside at the instance of the other partner, yet its validity could not be contested by a subsequent execution-creditor.<sup>3</sup>

Where the sale of partnership property has been made, under separate executions against the individual partners, at the same time, the interests in the proceeds remain as they existed in the property at the time of the levy.<sup>4</sup> In such case the court may direct an account to ascertain the respective rights of the partners in the proceeds;<sup>5</sup> and the distribution will be made accordingly, so that if one of the partners was in advance to the firm more than the whole amount of the proceeds, his creditors will be entitled to the whole fund.<sup>6</sup>

In equity each estate, individual, and partnership, is applied exclusively in the first instance to the payment of its own creditors.<sup>7</sup>

*Surplus.*—The surplus, if any, remaining after paying the amount of the executions and the costs, is the property of the debtor. And the sheriff cannot set up any claim against the surplus, by reason of a debt due him by the defendant, nor for the expenses incurred in taking care of the goods, though the sale was deferred at the instance of the defendant, and on his promise to pay the expense;<sup>8</sup> and in such case the debtor or his transferee must take the surplus out of court in preference to the sheriff.<sup>9</sup> But the surplus in the hands of the officer may be levied on at the suit of a creditor.<sup>10</sup>

The return of the sheriff to a *fi. fa.*, that he paid over the surplus to one of the owners of the chattel for himself, and as agent for the others, is not a legitimate part of the return; and the proper remedy of one of the part owners to recover his share is in *assumpsit*, and not by an action for a false return.<sup>11</sup>

*Alias fieri facias.*—If part of the money only be levied, the plaintiff may have an *alias fieri facias* for the residue.<sup>12</sup> Where judgment on warrant of attorney is entered by mistake for less than the amount of the bond, the court may amend after *fi. fa.* executed, and an *alias* may issue for the balance uncollected, if the rights of third persons are not thereby prejudiced.<sup>13</sup>

<sup>1</sup> *Rex v. Lomman*, C. P. York, 3 Phila. Rep. 287; affirmed in *Coover's Appeal*, 5 Casey 9.

<sup>2</sup> *Paxson v. Beans*, C. P. Bucks, 3 Phila. Rep. 433.

<sup>3</sup> *Grier v. Hood*, 1 Casey 430.

<sup>4</sup> *Kelly's Appeal*, 4 Harris 59; *Cooper's Appeal*, 2 Casey 262.

<sup>5</sup> *Kelly's Appeal*, 4 Harris 59.

<sup>6</sup> *Cooper's Appeal*, 2 Casey 262.

<sup>7</sup> *Babb v. Reed*, 5 Rawle 151; *Walker v. Eyth*, 1 Casey 217; *Singizer's Ap-*

*peal*, 4 Ibid. 524; *Black's Appeal*, 8 Wright 503; *Houseal's Appeal*, 9 Wright 484.

<sup>8</sup> *Fitch's Appeal*, 10 Barr 461.

<sup>9</sup> *Ibid.*, 2 Am. L. J. 91.

<sup>10</sup> *Herron's Appeal*, 5 Casey 240; *Rudy v. The Commonwealth*, 11 Casey 166.

<sup>11</sup> *Hopkins v. Forsyth*, 2 Harris 34.

<sup>12</sup> *Tidd Pr.* 1019.

<sup>13</sup> *Smith v. Hood*, 1 Casey 218.

The first writ must be returned before a second can be taken out; for that must be grounded upon the first, and recite that all the money was not levied thereon: though, if upon the first all the money had been levied, the writ need not have been returned, for no further process was necessary; and if nothing be levied on the first writ it need not be recited in the second.<sup>1</sup> So if a *testatum*-execution against part of the defendants be unreturned, and no execution was issued against the others within a year and a day after judgment, an *alias* is irregular.<sup>2</sup> The issuing of an *alias* without disposing of the former levy is an irregularity; but none but the defendant can take advantage of it.<sup>3</sup> An omission to recite the proceedings under the first writ, though irregular, does not render the *alias fi. fa.* void.<sup>4</sup>

An *alias* issued to the same term as the first writ is irregular, and will be set aside.<sup>5</sup> But where the inquisition on which the first writ was founded was set aside and a new one held, a *fi. fa.* issued on the second inquisition to the same term is not objectionable.<sup>6</sup> If after a sale has been set aside an *alias fi. fa.* issue, it is not an independent writ, though irregular; in substance, though not in form, it is a continuance of the original execution.<sup>7</sup>

The issuing of an *alias* will not release the sheriff from liability incurred on the *fi. fa.*; nor will the subsequent granting of a rule to show cause why the judgment should not be opened.<sup>8</sup>

Where the maker of several promissory notes secured by bond and chattel mortgage, had agreed with the payee that in the event of an execution being levied upon the mortgaged property, the obligor might proceed to collect the unpaid residue by execution levied upon said property as if all said notes had become due, and after a *fi. fa.* had been issued for the amount of one of the notes, an execution was levied on the mortgaged property at the suit of another creditor, the obligor might issue a second *fi. fa.* for the residue of his debt, notwithstanding the first had not been returned.<sup>9</sup> This was not an *alias*, which issues for the same debt, but a second writ for another debt.

*Venditioni exponas*.—If the sheriff return that he has taken goods, which remain in his hands unsold for want of buyers, the plaintiff may sue out a writ of *venditioni exponas* reciting the former writ and return, and commanding the sheriff to expose the goods to sale, and have the moneys arising therefrom in court at the return of it.<sup>10</sup> If goods are not taken to the value of the whole debt, he may have a *venditioni exponas* for the goods already taken, with a clause of *fi. fa.* for the residue of the debt.<sup>11</sup> And it is said that if a sheriff seize goods to the value and return it, he is bound to find buyers.<sup>12</sup> If he wilfully delay to sell for an unreasonable time, with

<sup>1</sup> Tidd Pr. 1020.

<sup>2</sup> Gibbs v. Atkinson, D. C. Phila., 3 P. L. J. 139.

<sup>3</sup> Potts's Appeal, 8 Harris 253.

<sup>4</sup> Coleman v. Mansfield, 1 Miles 56.

<sup>5</sup> Shaffer v. Watkins, 7 W. & S. 229.

<sup>6</sup> Springer v. Brown, 9 Barr 305.

<sup>7</sup> McAfoose's Appeal, 8 Casey 276.

<sup>8</sup> Myers v. Commonwealth, 2 W. & S. 60. See Evans v. Boggs, Ibid. 229.

<sup>9</sup> Martin v. McBride, D. C. Phila., 2 Phila. Rep. 343.

<sup>10</sup> Tidd Pr. 1020; Gibson v. Phila Insurance Co., 1 Binn. 405.

<sup>11</sup> Tidd Pr. 1020; Bing. on Ex. 262.

<sup>12</sup> 6 Mod. 293; s. c., 2 Ld. Raym. 1075.

a view to injure the defendant, he is liable to an action.<sup>1</sup> He may sell, and it is his duty to sell without a *venditioni exponas*; this writ is only necessary to bring the sheriff into contempt for not selling on the *fi. fa.*<sup>2</sup> If he has made the return of levied and unsold for want of buyers, then he is not liable, but a *venditioni exponas* must issue.<sup>3</sup>

The peculiar office of a *venditioni* as it regards personal property, is to force the sheriff to sell when he has returned a levy unsold for want of buyers; and when it is thought the property returned levied will not satisfy the debt, the plaintiff may have a clause of *fi. fa.* added, to justify the levy and sale beyond what is described in the *venditioni*: this shows he can sell no more by the *venditioni* than what is therein commanded to be sold.<sup>4</sup>

Where a sheriff goes out of office after returning that he has levied, but that the goods remain on his hands for want of buyers, instead of suing out a *venditioni exponas*, the plaintiff may sue out a *distringas nuper vice comitem*, directed to the present sheriff, commanding him to distrain the late sheriff to sell the goods.<sup>5</sup> The former sheriff must thereupon sell the goods and pay over the money, otherwise he will forfeit issues to the amount of the debt.<sup>6</sup> And a *distringas* directed to the coroner, will lie against a sheriff *while in office*, to compel a sale of goods levied on.<sup>7</sup> The court has refused to grant an attachment against the sheriff, because he returned to a *venditioni exponas* that part of the goods levied remained in his hands for want of buyers.<sup>8</sup> And where he returned to a *venditioni exponas* with a clause of *fi. fa.*, that he had made a certain sum of the goods, but omitted by mistake to return *nulla bona* to the *fi. facias*, he was allowed to amend the return, and an attachment against him for making it was set aside.<sup>9</sup> And where he had sold only part of the goods under the *venditioni exponas*, notwithstanding his return to the *fi. fa.*, he was allowed, in an action against him for not selling the residue or paying the money, to show that the execution-defendant became bankrupt before the judgment, and that the plaintiff knew of his insolvency at the time of the action.<sup>10</sup>

### SECTION III.

#### EXECUTION AGAINST CHOSSES IN ACTION.—ATTACHMENT-EXECUTION.—EXECUTION AGAINST STOCK.

*Preliminary.*—The Act of 1836 provides, in sections 32 to 38, inclusive, a mode of proceeding against corporation stock owned by the defendant, but held in the name of another, and against debts

<sup>1</sup> 3 Stark. Nisi Prius 163.

<sup>2</sup> Zane's Executors v. Cowperthwaite, 1 Dallas 313; Beale's Executors v. Commonwealth, 11 S. & R. 304.

<sup>3</sup> Ibid.

<sup>4</sup> Frisch v. Miller, 5 Barr 315.

<sup>5</sup> Tidd Pr. 1021; 1 Arch. Pr. 271; 2 Saund. 47 l.

<sup>6</sup> 6 Mod. 295. See further as to the

*distringas*, ante, 855; Bing. on Ex. 111: Tidd Pr. 1021.

<sup>7</sup> Zane's Executors v. Cowperthwaite, 1 Dallas 312.

<sup>8</sup> 1 Bos. & Pul. 359; and see 4 Moore 339.

<sup>9</sup> 1 Marsh. 344.

<sup>10</sup> 6 Maule & Selw. 42.



due the defendant, or deposits of money made by him, or goods and chattels pawned, pledged, or demised by him.<sup>1</sup> This process is called indifferently attachment-execution, or execution-attachment, and, as will appear hereafter, enables the plaintiff to reach the choses in action of the defendant almost as effectually as the *fi. fa.* reaches his choses in possession. It has been considerably modified by subsequent acts, which will be explained in their proper places.

Although the mode of proceeding against the defendant's stock, when held in another's name, is very similar to that against his other choses in action, yet there are peculiarities in the practice in executions against stock which make it preferable to treat them separately. We will then first consider the attachment-execution as relates to choses in action generally, and afterwards discuss the practice in relation to stock, so far as it differs from the other proceeding.

*The nature of an attachment-execution* seems to be a process not directly issued against the defendant himself, or property of his in his own possession, but to seize and secure property of the defendant which is in the hands and possession of some other person, which other person is always notified to appear at the return of the writ, to answer as to the right of property attached.<sup>2</sup> But it is not confined to a mere discovery of defendant's property, so as to enable plaintiff to go on with his execution; but where the defendant and the garnishee are brought into court on the *sci. fa.*, and the interrogatories have been filed and answered, the court, if fraud appear, may render a joint judgment against them both for plaintiff's debt, on which executions may issue against them.<sup>3</sup>

The writ is a mandate to the sheriff from the court, directing him to attach the defendant by all his rights and credits, goods and chattels, in whose possession soever the same may be found in the bailiwick, so that he may appear before the court at a day specified to answer the plaintiff; and also directing the sheriff to make known to the debtor of defendant, or to the depositary, bailee, pawnee, &c., of his goods (who is called the garnishee from being thus warned or garnisheed), that he appear and show cause why the plaintiff's judgment and costs should not be levied of the effects of the defendant in his, the garnishee's hands.

An attachment-execution is process to enforce the judgment: it is in substance if not in form an execution, and subject to the rules governing execution.<sup>4</sup> It is an execution within the meaning of the Married Woman's Act.<sup>5</sup> It is an execution auxiliary to the old forms of execution for the purpose of reaching what could not be touched or reached in that way.<sup>6</sup> And, as in ordinary executions, the debtor may claim the benefit of the Exemption Law against the attaching creditor.<sup>7</sup> So if the defendant die after attachment laid,

<sup>1</sup> Act 16th June 1836, §§ 32-38, *Purd. Dig.* 434, pl. 27, *et seq.*, *Pamph. L.* 767.

<sup>2</sup> *Hawley v. Lumbermen's Bank*, 10 *Watts* 232, per *HUSTON, J.*

<sup>3</sup> *Shaffer v. Watkins*, 7 *W. & S.* 219.

<sup>4</sup> *Wray v. Tammany*, 1 *Harris* 394.

<sup>5</sup> *Franklin v. Rush*, D. C. *Phila.*, 1 *Phila. Rep.* 571.

<sup>6</sup> *Fitzsimmon's Appeal*, 4 *Barr* 250; *Kase v. Kase*, 10 *Casey* 128.

<sup>7</sup> *Strouse's Executor v. Becker*, 2 *Wright* 190; *Same v. Same*, 8 *Ibid.* 206.

the proceeding may go on against the garnishee without its being necessary to make the executors of defendant parties, just as a *fi. fa.* issued in defendant's lifetime may be executed after his death.<sup>1</sup> And it has been treated as an execution within the Soldier's Stay Law of 1861.<sup>2</sup> So the plaintiff may withdraw it at any time, and issue a fresh attachment.<sup>3</sup>

Where an attachment was issued on a transferred judgment, it was held that a stay granted on the original judgment did not affect the attachment.<sup>4</sup>

It is a process collateral to the regular action between the parties for the same debt or duty, and is not incompatible with such action, except so far as it actually interferes in its enforcement, or endangers the rights of some of the parties; as a collateral process it is under the control of the court, as in other cases where several remedies are employed for the same claim or duty; and, as an execution, it is under the control of the court so far as to see that it is not used vexatiously, and that the garnishee shall run no risk of being compelled to make double payment.<sup>5</sup> Like the foreign attachment, it is not exclusively a proceeding *in rem*; it is also an action against the garnishee personally.<sup>6</sup> Though the courts will consider it as a proceeding against the defendant's effects in the hands of the garnishee, rather than an action against the garnishee personally, so far as it may be necessary to protect the garnishee against an improper use of the judgment.<sup>7</sup>

*Where it lies.*—Though it may be that an attachment-execution will not lie in all cases in which a foreign attachment would lie, yet it seems that where a foreign attachment would not lie, if defendant had left the State, an attachment-execution will not lie if he remains.<sup>8</sup>

In general it may issue on any judgment: even a transcript of a

<sup>1</sup> *Etting v. Moses*, D. C. Phila., Sept. 28th 1852; s. c., 1 Phila. Rep. 399. Rule for judgment against garnishees. The award of the auditor in the Orphans' Court, which confirmed, became the decree of that court, ascertained, conclusively, that the fund in the hands of the garnishees was due and payable to the original defendant, and precludes inquiry as to that question here.

This attachment was sued out, and served in the defendant's lifetime. It is supposed that the defendant having died pending the attachment, the proceeding must be revived by *scire facias* against his legal representatives, before judgment can be finally entered against the garnishee. The attachment is, in substance, an execution, as it was levied in the defendant's lifetime; analogy is opposed to the doctrine that the personal representative must be warned. As, in the other case, if there is equitable ground, they will be let in to take defence. Rule absolute.

<sup>2</sup> *Lewis v. Lewis*, 11 Wright 128.

<sup>3</sup> *Bank v. Nelson*, D. C. Phila., Oct

4th 1851. Why attachment should not be dissolved. *Per curiam*. We see nothing to hinder a plaintiff from withdrawing or abandoning an attachment of execution and issuing another. It is not like the discontinuance of an action, but may be assimilated to the withdrawal of a levy, or the stay of proceedings upon a *fi. fa.*, which certainly was never considered to interfere with his right to take out another execution. R. D.

<sup>4</sup> *Baker v. King*, 2 Grant 254.

<sup>5</sup> *Kase v. Kase*, 10 Casey 128.

<sup>6</sup> *Childs v. Digby*, 12 Harris 23. *Breeding v. Siegworth*, 5 Casey 396. On the ground that the proceeding is not exclusively *in rem* a judgment in foreign attachment, though conclusive as to parties and privies, is held not to conclude all the world as to the defendants' ownership of the chattels: *Meece v. Beirne*, 3 Wright 50.

<sup>7</sup> *Kase v. Kase*, 10 Casey 128.

<sup>8</sup> *Taylor v. Hulme*, 4 W. & S. 411, per HUSTON, J.

justice's judgment filed in the Common Pleas,<sup>1</sup> or an award of arbitrators,<sup>2</sup> or a judgment obtained prior to the passage of the Act of 1836, by which this remedy was given.<sup>3</sup> A prior return of "*nulla bona*" has been held essential to the validity of an attachment issued on a justice's transcript, filed in the Common Pleas.<sup>4</sup> But this has since been overruled.<sup>5</sup>

Where the plaintiff has issued a *fi. fa.*, under which the defendant's real estate has been levied and condemned, he cannot have an attachment on the same judgment—he has made his election.<sup>6</sup>

Under the Act of 1836, it did not lie upon a judgment against an insolvent corporation.<sup>7</sup> But this is remedied, except as to municipal corporations, by the Act of 20th March 1845, § 4,<sup>8</sup> which directs that the process shall be proceeded in to final judgment and execution, in the same manner and under the same rules and regulations as are directed by the Act of 1836, in reference to attachment-executions.<sup>9</sup> It has been contended that an insolvent improvement company is not within this act, but the Supreme Court held that an attachment would lie in such case.<sup>10</sup>

Where a debtor's property was attached in the hands of his agent, who was made defendant, and afterwards an attachment was issued against the principal himself for the balance of the debt still due, it was held that the first attachment was not a release of the principal, but that he was liable on the second.<sup>11</sup>

*What may be attached.*—The Act of 1836 specifies debts due to the defendant, and deposits of money made, or goods or chattels pawned, pledged, or demised by him.<sup>12</sup> To these have since been added all legacies, devises of land, and interests in real or personal estate of a decedent, by will or otherwise, which were subjected to foreign attachment under the Act of July 27th 1842.<sup>13</sup> The last-mentioned act subjects to foreign attachment all legacies given and lands devised to any person or persons, by will or testament, and any interest which any person or persons may have in the real or personal estate of any decedent, whether by will or other-

<sup>1</sup> Hitchcock v. Long, 2 W. & S. 169. And the Act of 1845, giving authority to justices of the peace to issue attachment-execution, does not deprive the Common Pleas of the power to issue such writs upon transcripts: Brechemin v. McDowell, C. P. Phila., 1 Phila. Rep. 368. See Act 15th April 1845, Purd. Dig. 603, pl. 90-96, Pamph. L. 459.

<sup>2</sup> Wray v. Tammany, 1 Harris 394.

<sup>3</sup> Bank of Chester v. Ralston, 7 Barr 482.

<sup>4</sup> Clevensline v. Law, 5 P. L. J. 459; Moore v. Ridsen, Ibid. 429; Guerin v. Guest, 4 P. L. J. 471.

<sup>5</sup> Swanger v. Snyder, 14 Wright 218.

<sup>6</sup> Hallowell v. McClay, C. P. Phila., 15 Leg. Int. 357. See Farr v. Carlton, D. C. Phila., 17 Leg. Int. 109.

<sup>7</sup> Ridge Turnpike Co. v. Paddle, 4 Barr 490.

<sup>8</sup> Purd. Dig. 201, pl. 49, 436, pl. 37, Pamph. L. 189.

<sup>9</sup> The practice in executions against corporations will be treated *post*, Sec. VI.

<sup>10</sup> Reed v. Penrose's Executrix, 12 Casey 214. And see the dissenting opinions s. c., 2 Grant 472.

<sup>11</sup> Glenn v. Davis, 2 Grant 153.

<sup>12</sup> Sect. 35, Purd. Dig. 434, pl. 30, Pamph. L. 767. This section refers to the 23d section of the same act, Purd. Dig. 432, pl. 13, which is more explicit in its description; its words are "goods or chattels of the defendant . . . which shall have been pawned or pledged by him as security for any debt or liability, or which have been demised or in any manner delivered or bailed for a term." Good v. Obertauffer, D. C. Phila. In *post*, "Things pledged or demised."

<sup>13</sup> Act 13th April 1843, § 10, Purd. Dig. 435, pl. 35, Pamph. L. 235.

wise: *Provided*, that the provisions of this act shall not extend to legacies and distributive shares due married women.<sup>1</sup> But where the husband received his wife's share prior to the Act of 1848, and mingled it with his own, as part of his capital in trade, it may be attached by his creditors.<sup>2</sup> By the Act of 15th April 1845, § 5, it is enacted that the wages of any laborers, or the salary of any person in public or private employment, shall not be liable to attachment in the hands of the employer.<sup>3</sup>

*Debts.*—In accordance with the above acts, it has been held that, whenever a party has a right of action, except in the case of wages, his creditors may attach it;<sup>4</sup> but this is perhaps too broadly stated. It was at first held that a debt not due could not be attached;<sup>5</sup> but the law now is that debts due *in presenti*, but payable *in futuro*, are attachable. Thus, a promissory note may be attached before maturity,<sup>6</sup> or a check.<sup>7</sup> So may an unliquidated claim against an insurance company,<sup>8</sup> or a debt which, though uncertain at the time of the attachment, became fixed and definite at the time of answer.<sup>9</sup> But not a debt which did not become payable till after issue joined in the attachment; although it had vested in interest before the attachment; in this case the fund was the fruit of a bequest, and though vested in interest, was subject to a power of appointment, and therefore liable to be divested at any moment by the exercise of the power; the holder of this power died, without having exercised it, after the case was at issue—too late to aid the plaintiff.<sup>10</sup> So

<sup>1</sup> Act 27th July 1842, § 1, *Purd. Dig.* 492, pl. 6, *Pamph. L.* 436.

<sup>2</sup> *Gross v. Reddig*, 9 *Wright* 406.

<sup>3</sup> *Purd. Dig.* 435, pl. 33, *Pamph. L.* 460.

<sup>4</sup> *Park v. Matthews*, 12 *Casey* 28; *s. c.*, 2 *Grant* 136.

<sup>5</sup> *McCreary v. Topper*, 10 *Barr* 420.

<sup>6</sup> *Kieffer v. Ehler*, 6 *Harris* 388. *Kent v. Schuylkill Navigation Company*, D. C., Saturday, June 19th 1852. Attachment sur judgment. *Per curiam*. It has been decided by the Supreme Court that an attachment of execution is available as a process to attach debts not due at the time it is served. The words of the Act of Assembly are, "debts due to the defendant," and upon the natural construction of these words this court has uniformly held that debts not due could not be attached. In this very case we refused to give a judgment on this ground, when application was formerly made for this purpose. We are bound to yield to the decision of the Supreme Court, though as yet we are uninformed as to the reasons of it. The debt, in this case, is not yet due, and will not be due until 1st January 1856. In foreign attachment, a debt growing due upon bond or contract may be attached before it is due and payable, and judgment may be

against the garnishee, but execution shall not issue till the time of payment. The Act of Assembly in regard to attachment of execution, provides how execution shall be issued against the garnishee in case of a judgment for a debt due, and evidently contemplates that, whenever the plaintiff is entitled to judgment, he shall have execution. We decline, then, entering the special judgment asked for in this case. The attachment itself gives him all that such a judgment could give him against the garnishee—a lien upon the debt and its accruing interest. We are not at present prepared to say what is the proper practice to adopt under the new aspect presented by the recent decision of the Supreme Court. All that we do at present is to refuse to enter the special judgment now prayed for. Rule dismissed.

<sup>7</sup> *Fulwiler v. Hughes*, 5 *Harris* 440.

<sup>8</sup> *Field v. Ins. Co.*, D. C. Phila., 4 *Phila. Rep.* 286; *s. c.*, 3 *Grant* 329; *s. c.*, 9 *Wright* 129. This was in foreign attachment. See *Buckley v. Garrett*, 11 *Wright* 204; 9 *Pitts. Leg. Jour.* 281.

<sup>9</sup> *Frank. Fire Ins. Co. v. West*, 3 *W. & S.* 350.

<sup>10</sup> *Brown v. Brown*, D. C. Phila., 3 *Phila. Rep.* 359.

a debt not contracted till after service of the attachment, is not bound.<sup>1</sup> And an annuity cannot be attached before the day on which it becomes payable; until then, though the annuity was accruing, there was nothing due the defendant.<sup>2</sup>

An overdue note may be attached in the hands of the maker for the debt of the holder.<sup>3</sup>

So a claim against an insurance company, which has been ascertained by arbitration, may be attached.<sup>4</sup>

Where personal property insured against fire was sold, but it was agreed between the vendor and vendee that the former should retain possession of the goods and of the policy of insurance until he should be paid in full, it was held that as the goods might have been seized by the creditors of the vendor, so if they were destroyed by fire before they were paid for, he had an insurable interest to the extent of the unpaid purchase-money which was attachable by his creditors.<sup>5</sup>

A debt due to a non-resident by a foreign corporation located here, may be attached.<sup>6</sup>

A debt payable in the bonds of a municipal corporation may be attached, and the bonds may be sold under this process.<sup>7</sup>

It has been held that a debt due by a decedent cannot be attached in the hands of his executor as garnishee,<sup>8</sup> but such an attachment has been sustained.<sup>9</sup>

<sup>1</sup> *Tracy v. Bridges*, 2 Miles 352.

<sup>2</sup> *Canby v. Day*, 2 Miles 412. See *Rundle v. Sheetz*, *Ibid* 330.

<sup>3</sup> *Wetmore v. Price*, D. C. Saturday, April 8th 1848. Rule for a new trial. *Per curiam*. We are of opinion that a negotiable note may, after it is due, be attached in the hands of the maker for the debt of the then holder of it. An attachment is payment to the defendant, or, what is in effect the same thing, it is an appropriation of the fund made by the law exercising the power of the defendant to the attaching creditor. The case of *Hughes v. Large*, 2 Barr 103, then, does not apply. It is there decided that a debt due to the maker from the payee cannot be set off against the endorsee of a note overdue; but it is not decided there, or anywhere else, that a direct payment made by the maker to the payee will not avail the former. We think, however, that Anthony was a competent witness, and should have been admitted. It was alleged that at the time the attachment was laid, the defendant had passed the note for value to Anthony, and he was offered as a witness to prove this. As the matter then appeared, he could not have been affected by the result of the verdict, nor could it have been given

in evidence for or against him in a suit by him against the maker. If a garnishee suffers the goods of A. to be condemned in his hands as the goods of B., the condemnation will not protect him against an action by A. : *Eyre, C. J.*, in *Phillips v. Hunter*, 2 H. Bl. 410. If, indeed, it had appeared either *aliunde* or by the examination of Anthony upon his *voir dire*, that he had been notified to take defence in this suit, the case would then have been different. He would then have been concluded by the result, and the verdict and judgment would have been evidence against him. But this is not to be inferred without evidence, and the mere fact that he knew of the suit, is not enough, unless he has tendered to him the right to intervene and defend in the name of the garnishee: *Coates v. 4 Rawle* 100. Rule absolute.

<sup>4</sup> *Boyle v. Frank. Ins. Co.*, 7 W. & S. 76.

<sup>5</sup> *Norcross v. Ins. Co.*, 5 Harris 429.

<sup>6</sup> *Fithian v. N. Y. & E. Railroad Co.*,

7 Casey 114.

<sup>7</sup> *King v. Hyatt*, 5 Wright 229.

<sup>8</sup> *Reisky v. Clayton*, D. C. Phila., 2 Phila. Rep. 101.

<sup>9</sup> *Chambers v. Baugh*, 2 Casey 105.

A debt in suit may be attached,<sup>1</sup> though in another court.<sup>2</sup> So may a debt established by judgment, though in a foreign jurisdiction.<sup>3</sup> A judgment may be attached even after execution issued and levied; the levy, as between the parties thereto, is not a satisfaction of the debt, and therefore, up to the time of the sale, there was a debt due to the execution-plaintiff which was attachable by his creditors.<sup>4</sup> If, after the attachment of a judgment, it was opened by agreement between the original parties, bail for stay of execution is discharged, although the attaching creditor has, in the mean time, obtained judgment on the attachment against the garnishee, and has procured an assignment of the attached judgment to his own use.<sup>5</sup>

After sale under an execution, the proceeds in the hands of the officer cannot be attached.<sup>6</sup> Nor can the surplus of proceeds of an execution be attached in the hands of the officer for the debt of the defendant.<sup>7</sup> But where the defendant requested the sheriff, in making sale of his personal property, to sell at the same time for defendant's benefit articles exempted from execution, the proceeds of these are attachable in the hands of the sheriff.<sup>8</sup> So money collected by a justice of the peace cannot be attached in his hands.<sup>9</sup>

A debtor who has publicly assumed, under a contract with his creditor, to pay certain claims against the creditor, is bound by such assumption, and the amount payable cannot be afterwards attached at the suit of a creditor of his creditor.<sup>10</sup> Though a partial assignment of a debt, without the debtor's assent, is invalid against an attachment.<sup>11</sup>

A *chose in action*, which has been equitably assigned, is no longer subject to attachment for a debt of the assignor.<sup>12</sup> Any order, writing, or act which makes an appropriation of a fund, amounts to an equitable assignment of that fund.<sup>13</sup> And an agreement by the plaintiff in an action for unliquidated damages, that his attorney should have a fixed sum out of the verdict for his services, operates as an equitable assignment to that extent.<sup>14</sup> But a power of attorney to collect a debt, and pay part of the proceeds to another, is not such an assignment, before its execution in whole or in part, as will defeat an attachment.<sup>15</sup> Nor a naked power of

<sup>1</sup> *Sweeney v. Allen*, 1 Barr 380; *Crabb v. Jones*, 2 Miles 130.

<sup>2</sup> *Jones v. N. Y. & E. Railroad Co.*, 1 Grant 457; s. c., 2 Phila. Rep. 318.

<sup>3</sup> *Ibid.*; *Fithian v. N. Y. & E. Railroad Co.*, 7 Casey 114.

<sup>4</sup> *Winternitz's Appeal*, 4 Wright 490. This had been doubted: *Nav. Co. v. Ledlie*, D. C. Alleg., 3 P. L. J. 179.

<sup>5</sup> *Corson v. McAfee*, 8 Wright 288.

<sup>6</sup> *Fretz v. Heller*, 2 W. & S. 400; *Crossen v. McAllister*, 2 P. L. J. 199; *Bentley v. Clegg*, 3 P. L. J. 62; *Commonwealth v. Watmough*, *Ibid.* 64; *Charles v. Oatman*, 4 P. L. J. 239.

<sup>7</sup> *Crossen v. McAllister*, 2 P. L. J.

199. *Sed quare*, for it may be levied on by the officer under another *fi. fa.*: *Herron's Appeal*, 5 Casey 240. See *Rudy v. Commonwealth*, 11 Casey 166.

<sup>8</sup> *Charles v. Oatman*, 4 P. L. J. 239.

<sup>9</sup> *Corbyn v. Bollman*, 4 W. & S. 342.

<sup>10</sup> *Vincent v. Watson*, 6 Harris 97.

<sup>11</sup> *McCaffery v. Cassidy*, D. C. Phila., 3 Phila. Rep. 210.

<sup>12</sup> *Canal Co. v. Insurance Co.*, D. C. Phila., 2 Phila. Rep. 354.

<sup>13</sup> *Clemson v. Davidson*, 5 Binn. 398; *Aycinena v. Peries*, 6 W. & S. 251.

<sup>14</sup> *Patten v. Wilson*, 10 Casey 299.

<sup>15</sup> *Johnson v. Ogilbee*, D. C. Phila., 2 Phila. Rep. 79.

attorney to sell stock, uncoupled with an interest, even though given to a creditor.<sup>1</sup>

So the assignment and transfer of a note in payment of a debt is good against a subsequent attachment of the note, though the garnishee had no notice of the assignment previous to service, and although the assignment was not under the Act of 28th May 1715;<sup>2</sup> and if the assignor has the note in his possession after the assignment, at the time of service, and offers by permission of the assignee to use it for a special purpose in which he is unsuccessful, it remains the property of the assignee, and not liable to attachment by assignor's creditors;<sup>3</sup> and if the note be assigned by the payee in contemplation of bankruptcy, such assignment is good as between the promisor and the assignee, unless avoided by the payee being declared a bankrupt, and if this is not done, it seems no one of his creditors has a right to attach the note in payment of his debt.<sup>4</sup> So if after the attachment of a note, it is assigned before maturity for a valuable consideration, and without notice to the assignee, the attachment is unavailing against the holder;<sup>5</sup> but it is otherwise if the assignment were after maturity of the note.<sup>6</sup> And the court will grant an injunction to restrain the holder of a note attached before maturity from negotiating it.<sup>7</sup>

A check drawn upon a banker is not of itself an appropriation of the funds in his hands belonging to the drawer, unless it plainly appears that the fund claimed was the one designated out of which payment was to be made.<sup>8</sup> And where, between the drawing and the presentation of a check on a bank, the funds of the drawer were attached in the hands of the bank as garnishee, the holder of the check was postponed to the attachment.<sup>9</sup> Nor did an arrangement between the drawer, payee, and banker, that in case of an attachment the check should be at once passed to the credit of the payee, and charged to the drawer, amount to an assignment, or raise any trust in favor of the payee; nor was it a present appropriation of the money.<sup>10</sup> But a draft upon a fund in the hands of an attorney, though not accepted, is such an assignment as will defeat an attachment.<sup>11</sup>

An assignment, by a party, of the report of referees as security for counsel fees and advances, in the suit, left the assignor the owner of the residue after payment of such fees and advances, and his interest therein is attachable in the hands of the debtors.<sup>12</sup> So, where a firm assigned all their partnership effects in trust to pay all their partnership debts, and to pay over any surplus to the assignors, the assignment is valid, and the surplus is several property, and open to attachment for several debts; the assignment in no way hinders the creditors from reaching the surplus.<sup>13</sup>

<sup>1</sup> *Morrel v. Bank of Pa.*, D. C. Phila., 2 Phila. Rep. 61.

<sup>2</sup> *Purd. Dig.* 112; 1 Sm. Laws 90.

<sup>3</sup> *Pellman v. Hart*, 1 Barr 263.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Hill v. Kroft*, 5 Casey 186.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Kieffer v. Ehler*, 6 Harris 388.

<sup>8</sup> *Lloyd v. McCaffrey*, 10 Wright 410.

<sup>9</sup> *Harry v. Wood*, 2 Miles 327.

<sup>10</sup> *Lloyd v. McCaffrey*, 10 Wright 410.

<sup>11</sup> *Nesmith v. Drum*, 8 W. & S. 9.

<sup>12</sup> *Fithian v. N. Y. & E. Railroad Co.*,

7 Casey 114.

<sup>13</sup> *Hubler v. Waterman*, 9 Casey 414.

So if an assignment for benefit of creditors is void as giving a preference, or not having been recorded, the proceeds may be attached in the hands of the assignee.<sup>1</sup> But not where the interest of the debtor in the goods had been previously levied on by the plaintiff, and released on a bond being given by the assignees to pay their value in case the assignment should be declared void, which bond was afterwards forfeited and paid;<sup>2</sup> so, if after the sale of the goods by the assignees a second assignment were made, passing all the claims and rights of the assignor, a subsequent attachment would be too late to affect them.<sup>3</sup>

But the broad doctrine laid down in *Stewart v. McMinn*, that all assets may be attached in the hands of the assignee under a void assignment for the benefit of creditors, was afterwards modified, and it was held that though the *proceeds* of the choses so assigned may be attached, yet uncollected debts the evidences of which came into the assignee's possession by virtue of the assignment cannot be attached in his hands; as to such things he is not the debtor of the defendant.<sup>4</sup> It has been held that an assignment by a firm of *part* of the assets to some of their creditors who had agreed to give a general release is not void, but the property belongs to *all* the creditors, and is not attachable by a non-releasing creditor as the property of the debtors.<sup>5</sup> And partnership property which the partners have separately assigned to the same assignee for the benefit of their creditors cannot afterwards be attached in the hands of the assignee.<sup>6</sup> And a specific assignment of choses in action to creditors, which is not a mere assignment in trust to collect and distribute the proceeds of such choses, need not be recorded, and is good against attachments by other creditors of the assignor.<sup>7</sup>

Where a voluntary assignee under a void assignment was directed by the court to pay over the proceeds to particular creditors, and a check sent the attorney of one of these creditors was returned by him, it was held that the money so returned remained liable to attachment in the hands of the assignee.<sup>8</sup> An assignment made in the state of New York, and valid under the laws of that state, if recorded in Pennsylvania under the Act 3d May 1855,<sup>9</sup> and if the instrument is such as would pass property between grantor and

<sup>1</sup> *Stewart v. McMinn*, 5 W. & S. 100; *Seal v. Duffy*, 4 Barr 274; *Wharton v. Grant*, 5 Barr 39; *Mitchell v. Stiles*, 1 Harris 307; *Driesbach v. Becker*, 10 Casey 152; *Morris Canal Co. v. Reeder*, S. C., 18 Leg. Int. 236; *Sutton v. Ashhurst*, D. C. Phila., 4 Phila. Rep. 301; *Johnson v. Herring*, 10 Wright 415.

A deposit of assets with a trustee, to secure future advances to be made to the assignor for the payment of his debts, is not an assignment for the benefit of creditors required to be recorded in order to be valid, and the assets are not attachable in the hands of the trustee for the debts of the assignor: *Griffin v. Rogers*, D. C. Phila.,

4 Phila. Rep. 76. And see cases cited in the opinion of the court; affirmed on error, *Griffin v. Rogers*, 2 Wright 382.

<sup>2</sup> *Taylor v. Hulme*, 4 W. & S. 407.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Raiguel v. McConnell*, 1 Casey 362. The proper course in such case is to serve the attachment upon those who are debtors of the defendant: *Ibid.*

<sup>5</sup> *Wiener v. Davis*, 6 Harris 331.

<sup>6</sup> *Nicholas v. Patterson*, D. C. Phila., 1 Phila. Rep. 92.

<sup>7</sup> *Tyson v. Abbott*, C. P. Bucks, 15 Leg. Int. 197.

<sup>8</sup> *Mitchell v. Stiles*, 1 Harris 306.

<sup>9</sup> *Purd. Dig.* 61, pl. 7, *Pamph. L.* 415.



grantee in this state, will operate as an assignment against all persons claiming subsequently to the time of recording, and prior to that time against purchasers and creditors having actual notice of it.<sup>1</sup> But such an assignment is invalid if not recorded in the county where the assigned property is situated.<sup>2</sup>

A debt due to a partnership may be attached by a separate creditor of one of the partners:<sup>3</sup> and so may partnership effects, in foreign attachment.<sup>4</sup>

A mere unexecuted contract to sell property is not such a debt as may be attached in foreign attachment.<sup>5</sup>

Property of a married woman is not in general liable to attachment by her husband's creditors: the rule in this respect is the same as in executions generally.<sup>6</sup> And a judgment in the joint names of husband and wife for damages for an injury to her person during coverture, cannot be attached by his creditors: the damages belong to her.<sup>7</sup> So where she purchased land, the fact that her husband joined with her in giving a mortgage for the purchase-money did not render rents accrued from the land liable to be attached for his debts.<sup>8</sup>

Money in the hands of an attorney at law belonging to his client may in general be attached:<sup>9</sup> but not if it be otherwise protected from execution, such as the portion of proceeds of real estate awarded to a defendant under the Exemption Law and paid over to his attorney by the sheriff.<sup>10</sup> Though proceeds of property exempt from execution may be attached if sold by the defendant himself.<sup>11</sup> And his recovery of damages in trespass for levying on exempt property, transfers the right of property and has the effect of a sale.<sup>12</sup>

Money in the hands of a public officer due a subordinate cannot be attached,<sup>13</sup> nor fees due a juror.<sup>14</sup> Money in the hands of a treasurer of school directors cannot be attached any more than that in the hands of a sheriff, prothonotary, State or county treasurer, or other fiscal officer of the State, or of municipal corporations.<sup>15</sup> So State loan cannot be attached in the hands of an agent of the State: as the State cannot be sued it follows that she cannot be made garnishee.<sup>16</sup>

Bank stock owned by and in possession of the bank cannot be attached for the debt of the bank.<sup>17</sup>

<sup>1</sup> *Evans v. Dunkelberger*, 3 Grant 134. This was in foreign attachment.

<sup>2</sup> *Philson v. Barnes*, 14 Wright 230. This was in foreign attachment.

<sup>3</sup> *McCarty v. Emlen*, 2 Dallas 277; s. c., 2 Yeates 190. This was in foreign attachment.

<sup>4</sup> *Morgan v. Watmough*, 5 Whart. 125.

<sup>5</sup> *Furness v. Smith*, 6 Casey 520.

<sup>6</sup> *Vide ante*, "What is liable to Execution," and *post*, "Legacies, &c."

<sup>7</sup> *Jeanes v. Davis*, D. C. Phila., 4 P. L. J. 406.

<sup>8</sup> *Goff v. Nuttall*, 8 Wright 78.

<sup>9</sup> *Riley v. Hirst*, 2 Barr 346; *Mitchell v. Stiles*, 1 Harris 307; *Board of Health v. Potts*, 3 P. L. J. 268. See *Silver-*

*wood v. Bellas*, 8 Watts 420; *Nesmith v. Drum*, 8 W. & S. 11.

<sup>10</sup> *Gery v. Ehrgood*, 7 Casey 329.

<sup>11</sup> *Knabb v. Drake*, 11 Harris 489. See *Charles v. Oatman*, 4 P. L. J. 239.

<sup>12</sup> *Knabb v. Drake*, 11 Harris 489.

<sup>13</sup> *Bulkley v. Eckert*, 3 Barr 368; *Pierson v. McCormick*, 2 P. L. J. 201; *Rundle v. Sheetz*, 2 Miles 330.

<sup>14</sup> *Simons v. Whartenaby*, 4 P. L. J. 226.

<sup>15</sup> *Bulkley v. Eckert*, 3 Barr 369.

<sup>16</sup> *Morrel v. Bank of Pennsylvania*, D. C. Phila., 2 Phila. Rep. 61.

<sup>17</sup> *Hawley v. Lumbermen's Bank*, 10 Watts 230.

The interest or proceeds of a fund in the hands of trustees to pay over such proceeds to the use and benefit of the defendant may be attached.<sup>1</sup> But where a fund was bequeathed to a trustee in trust to pay the interest at his discretion to A. B., and in case of his death "without leaving issue," to pay the principal to the children of C. D., the body of the legacy was not attachable by a creditor of A. B.<sup>2</sup> A devise to an insolvent son in trust for the use of the children of such son, with power to manage the trust fund, and invest the same in business, &c., with an allowance of a "reasonable support" to the trustee in return for his services in the execution of the trust, does not create in such trustee a beneficial interest which may be attached for his own debts.<sup>3</sup>

The unpaid purchase-money of land cannot be attached to the prejudice of prior judgment-creditors of the vendor.<sup>4</sup> But where land in which a husband has a curtesy is bound as to his interest by a judgment against him, the proceeds of a sale of the land are also bound, and the creditor's interest in the purchase-money may be attached in the hands of the purchaser as garnishee.<sup>5</sup> The creditor's interest being fixed by the judgment cannot be divested by the husband's release to the purchaser.<sup>6</sup>

The moiety of the cost of a party-wall may be attached.<sup>7</sup>

Money in the hands of a ticket agent of a corporation arising from the sale of tickets, cannot be attached in a suit against the corporation: it is not in the hands of third persons but in those of the company itself by its agents.<sup>8</sup> But funds deposited by the treasurer of a corporation with a banker, who was president of the corporation, under an agreement to pay interest thereon and to hold the same subject to call, were held to be attachable for the debt of the corporation.<sup>9</sup> And the defendant corporation cannot claim that its funds are not liable to attachment, because it needs them for the repair of its works, or has by resolution set them apart for that purpose.

A deposit in bank by a depositor, as "agent," is *prima facie* the property of his principal and is not liable to attachment for the debt of the "agent;" but in all such cases the name of the principal should be stated on the account.<sup>10</sup> But trust-money deposited by a trustee to his own account may be attached for his debt.<sup>11</sup>

An executor's commissions are not attachable for his debts, either in his own hands or those of his co-executors.<sup>12</sup>

*Things pawned, pledged, or demised.*—The lien of a livery-man

<sup>1</sup> *Park v. Matthews*, 12 Casey 28; s. c., 2 Grant 136; *Girard Life and Trust Co. v. Chambers*, 10 Wright 485.

<sup>2</sup> *Still v. Spear*, 9 Wright 168.

<sup>3</sup> *Brown v. Williamson's Executors*, 12 Casey 338.

<sup>4</sup> *Stewart v. Coder*, 1 Jones 91.

<sup>5</sup> *Lancaster Bank v. Stauffer*, 10 Barr 398.

<sup>6</sup> *Ibid.* And see the case for an explanation of the mode of proceeding.

<sup>7</sup> *Davids v. Harris*, 9 Barr 501.

<sup>8</sup> *Fowler v. Railroad Co.*, 11 Casey 22.

<sup>9</sup> *Reed v. Penrose's Executrix*, 12 Casey 214; s. c., 3 Phila. Rep. 198; 2 Grant 472; 7 Am. Law Reg. 126, per *Lowrie, C. J.*, and *Strong, J.* See the dissenting opinion of *Woodward, J.*, 2 Grant 472; *Fox v. Reed*, 3 *Ibid.* 81, *Woodward and Strong, Js.*, diss.

<sup>10</sup> *Bank of N. L. v. Jones*, 6 Wright 536; s. c., 8 *Ibid.* 253.

<sup>11</sup> *Paxson v. Sanderson*, D. C. Phila., 3 Phila. Rep. 303.

<sup>12</sup> *Adams's Appeal*, 11 Wright '94.

against a horse at livery, does not constitute him a pawnee within the act; such lien does not prevent a levy on the horse under a *fi. fa.*, and it cannot be attached in his hands as garnishee.<sup>1</sup> So goods deposited by the defendant in the garnishee's store are not attachable.<sup>2</sup> And goods consigned to a creditor on account of his advances, and of which he has purchased the consignor's interest during the transit, cannot be attached afterwards *in transitu* by creditors of the consignor.<sup>3</sup>

The writ will lie at the suit of creditors against a fraudulent vendee of defendant, who has sold part of the goods, and has the rest on hand: in such case the plaintiffs might have issued a *fi. fa.* or filed a bill of discovery in aid of execution, which would perhaps be the best course.<sup>4</sup>

We have seen that even before the Act of 1836 the sheriff might levy and sell under a *fi. fa.* goods pawned or leased by the defendant, subject to the rights of the lessee or pawnee, but neither he nor his vendee could disturb the possession of the lessee or pawnee; so that in fact all that passed by the sale was the defendant's interest in the goods.<sup>5</sup> So far then as goods pawned or leased are concerned, it would seem that the attachment and *fi. fa.* are concurrent remedies.<sup>6</sup> It has been held that a note deposited in pawn may be attached for the debt of the owner, the pawnee being made garnishee.<sup>7</sup>

*Legacies and distributive shares.*—We have seen that by the 10th section of the Act of 13th April 1843,<sup>8</sup> legacies given and lands devised by will or testament, and any interest in the real or personal estate of any decedent, whether by will or otherwise, except legacies and distributive shares due married women, are made liable to attachment in execution, as they had previously been made liable to foreign attachment.<sup>9</sup> Under these acts the interest of an heir in lands descending under the Intestate Laws is subject to attachment.<sup>10</sup> It having been held by the Supreme Court that under these acts an attachment did not lie against a distributive share

<sup>1</sup> Buckner v. Croissant, C. P. Phila., 3 Phila. Rep. 219.

<sup>2</sup> Good v. Obertauffer, D. C. Phila., Jan. 6th 1849. Motion for judgment against garnishee. *Per curiam*. This is an attachment of execution. The property in the hands of the garnishee, as appears by his answer, consists of goods. They were deposited by the defendant in the garnishee's store. They may be liable to a charge for storage, though the garnishee does not set that up. Admitting the lien to exist, they are, notwithstanding, "not goods pawned or pledged by him (defendant), as security for any debt or liability, or which have been demised, or in any manner delivered or bailed for a term." Referring back the words of the 35th section of the Act of 16th June 1836, *Purd. Dig.* 446, to the 23d section, the words "pawned, pledged, or demised, as aforesaid," have this

meaning. It can only mean an actual pawn or pledge for any debt or liability by defendant, not merely a lien arising by implication of law. This, therefore, is not a case for attachment of execution. Motion refused.

<sup>3</sup> Schumacker v. Eby, 12 Harris 521.

<sup>4</sup> French v. Breidelman, 2 Grant 319.

<sup>5</sup> *Ante*, p. 787. And see *Srodes v. Caven*, 3 Watts 258.

<sup>6</sup> The process was by *fi. fa.* in *Srodes v. Caven*, 3 Watts 258, which was approved in *Welsh v. Bell*, 8 Casey 17. The remedy by attachment is expressly given by the Act of 1836.

<sup>7</sup> *Rhoads v. Megonigal*, 2 Barr 39, per *ROGERS, J.*

<sup>8</sup> *Purd. Dig.* 435, pl. 35, *Pamph. L.* 235.

<sup>9</sup> By Act 27th July 1842, § 1, *Purd. Dig.* 492, pl. 6, *Pamph. L.* 436.

<sup>10</sup> *Straley's Appeal*, 7 Wright 89.

until it had been ascertained on settlement of the administration account,<sup>1</sup> the legislature intervened and enacted that the attachment might issue and be served at any time after the defendant's interest had accrued by reason of the death of the decedent; but the defendant's interest should not be sold in execution until a year after it had so vested, unless the administration account should be sooner filed.<sup>2</sup> In accordance with this act the courts have held that a legacy or distributive share may be attached before any settlement of the estate of decedent.<sup>3</sup> And such an interest in the proceeds of real estate may be attached, in whose hands or possession soever the same may be.<sup>4</sup> Thus the interest of a legatee in the proceeds of land sold by an administrator, *cum testamento annexo*, may be attached in the hands of the purchaser,<sup>5</sup> or of an agent of the executor who had received the money for the land.<sup>6</sup> But a mere naked power is not attachable, and therefore a legacy consisting of a share in the proceeds of land, directed to be sold by the executor after the death of testator's widow, cannot be attached in the hands of the executor until the event happens on which the power is to be executed.<sup>7</sup> When a legacy or distributive share is attached before the estate is settled, the court should so mould the judgment as to relieve the executor from personal responsibility;<sup>8</sup> when, after the attachment, a judgment was entered against the heir, under which his interest in lands descending to him under the Intestate Laws was sold, the attaching creditor is entitled to preference in the distribution of the proceeds.<sup>9</sup> When an executor is residuary legatee, and it appears that the assets are amply sufficient to satisfy all claims against the estate, a debt due the estate may be attached under a judgment against the executor for his private debt;<sup>10</sup> but not if it should appear that the assets are not sufficient without the executor's collecting the debts.<sup>11</sup>

Although the act excepts legacies and distributive shares due married women, yet the husband's *interest* in his deceased wife's distributive share of her parent's estate is liable to attachment,<sup>12</sup> and his *curtesy* in the valuation-money of lands to which she was an heir, and which have been accepted by other heirs, may be attached in the hands of the accepting heir as garnishee.<sup>13</sup> In such case, the life estate having been converted into money, a sequestrator cannot be appointed, but the creditor will be allowed possession of the fund,

<sup>1</sup> *Bank of Chester v. Ralston*, 7 Barr 482; *McCreary v. Topper*, 10 Ibid. 419, *BELL, J.*, diss. *Contra*, where there were no debts and a large estate: *Brady v. Grant*, 1 Jones 361.

<sup>2</sup> Act 10th April 1849, § 11, *Purd. Dig.* 436, pl. 36, *Pamph. L.* 620.

<sup>3</sup> *Sinnickson v. Painter*, 8 Casey 384; s. c., 16 Leg. Int. 77; *Lorenz's Administrator v. King*, 2 Wright 93.

<sup>4</sup> *Gochenaur's Executors v. Hostetter*, 6 Harris 414.

<sup>5</sup> *Brady v. Grant*, 1 Jones 361; *Baldy v. Brady*, 3 Harris 103.

<sup>6</sup> *Gochenaur's Executors v. Hostetter*,

6 Harris 414.

<sup>7</sup> *Hess v. Shorb*, 7 Barr 231, per *GIBSON, J.*, citing *Allison v. Wilson*, 13 S. & R. 330; *Morrow v. Brenizer*, 2 Rawle 185.

<sup>8</sup> *Lorenz's Administrators v. King*, 2 Wright 93.

<sup>9</sup> *Straley's Appeal*, 7 Ibid. 89.

<sup>10</sup> *Ross v. Cowden*, 7 W. & S. 376; *Pleasants v. Cowden*, Ibid. 379.

<sup>11</sup> Ibid.; *Hartshorne v. Henderson*, 6 P. L. J. 192.

<sup>12</sup> *Miller's Appeal*, 9 Harris 373.

<sup>13</sup> *Bank v. Stouffer*, 10 Barr 393.

and the produce of it during the husband's life, on giving such security as the court may direct for its ultimate restoration at the husband's death to the wife or her representatives.<sup>1</sup> But where there has been no reduction into possession, the wife's share in a recognisance in the Orphans' Court is not liable to attachment for her husband's debts.<sup>2</sup> And where no order for the settlement was made at the time of the partition, her subsequent consent before a judge of the Orphans' Court that her share should be paid to her husband, is not equivalent to a reduction into possession by him.<sup>3</sup> In *The Bank v. Stouffer*, above cited, there was an actual conversion of the land into money, a release by the husband to the accepting heir, and a note for the amount of the wife's share given by the heir to one in trust for her: but the case was decided on another ground, that the judgment against the husband, on which the attachment issued, bound his curtesy in the land, and this lien continued against the money substituted for it.

As will be seen hereafter,<sup>4</sup> when a legacy or distributive share is attached, the plaintiff, before receiving the money, must tender to the garnishee, executor, or administrator, a refunding bond. A debt due from the estate cannot be attached in the hands of the executor as garnishee: the Act of 1843 does not apply to such a case.<sup>5</sup> But in the same year the same court sustained an attachment of a debt due from an insolvent estate, in the hands of the executor as garnishee, and held that it was not prematurely laid, though before the filing and confirmation of the auditor's report, and before the amount to which the defendant would be entitled was ascertained, and on writ of error the Supreme Court affirmed the judgment.<sup>6</sup>

*Wages and salaries.*—The 5th section of the Act of 15th April 1845 provides that the wages of any laborer, or the salary of any person in public or private employment, shall not be liable to attachment in the hands of the employer.<sup>7</sup> This applies to all judgments whether in the Common Pleas or before a justice of the peace.<sup>8</sup> Justices have no jurisdiction of attachment-execution against wages.<sup>9</sup> Where a contractor employed laborers under him to do the work, the money due the contractor is not wages in the meaning of the act, and may be attached for his debt.<sup>10</sup> But where a skilled laborer, working by the piece, employs a common laborer by the day to assist him, his wages are not attachable, though his superior skill and care may entitle him to a greater compensation than the common laborer.<sup>11</sup>

If, however, a master-carpenter, in addition to a *per diem* salary for his own labor, is to receive assessments for each of his hands,

<sup>1</sup> Ibid.

<sup>2</sup> *Stoner v. The Commonwealth*, 4 Harris 387.

<sup>3</sup> Ibid.

<sup>4</sup> See *post*.

<sup>5</sup> *Reisky v. Clayton*, D. C. Phila., 2 Phila. Rep. 101.

<sup>6</sup> *Chambers v. Baugh*, 2 Casey 105.

<sup>7</sup> *Purd. Dig.* 435, pl. 33, Pamph.

<sup>8</sup> L. 460.

<sup>9</sup> *Catlin v. Ensign*, 5 Casey 264.

<sup>10</sup> *Firmstone v. Mack*, 13 Wright 387.

<sup>11</sup> *Heebner v. Chave*, 5 Barr 115.

<sup>12</sup> *Penna. Coal Co. v. Costello*, 9 Casey 241, qualifying *Heebner v. Chave*.

varying according to the degree of supervision each would require, though the amount due for his own labor is not attachable, the amount due for the assessments is not wages, and may be attached in the hands of his employer.<sup>1</sup> The fact that a laborer has contracted to apply his wages to pay for a lot agreed to be purchased from his employer, does not change its character as wages; and if the employer, after a settlement had, and a balance found due the laborer for wages, repudiates the contract for the sale of the lot, the balance due is wages, and not money paid to the employer, and it cannot be attached in execution.<sup>2</sup>

The wages of an apprentice may be attached, for the debt of his master, in the hands of a person with whom the apprentice was working under an agreement with the master.<sup>3</sup>

An agreement by a laborer to waive the exemption of his wages from attachment is void.<sup>4</sup>

The fees of a public officer are not attachable, though they may not be covered by the word "salary," in the Act of 1845.<sup>5</sup>

*Who may be made garnishee.*—In general the party owing the debt which is attached must be made garnishee. In case of an assignment of assets by a debtor the assignee must be made garnishee.<sup>6</sup> But a person who is not the debtor but merely holds the evidences of a debt, should not be made garnishee.<sup>7</sup> But he will be a debtor who has rendered himself liable as such by a want of fidelity or diligence in dealing with or collecting the debt.<sup>8</sup> And where the debt has been actually, or constructively, collected by him who has the means of enforcing its payment, he becomes chargeable with it as so much cash, and there is no reason why he should not be compelled to pay it over to the creditor of the party, to whom it belongs in point of fact or by legal intendment.<sup>9</sup>

A private corporation may be made garnishee, even one chartered under the laws of another State, if located here.<sup>10</sup> But not a municipal corporation,<sup>11</sup> nor the State,<sup>12</sup> nor its loan agent in respect to

<sup>1</sup> *Smith v. Brooke*, 13 Wright 150.

<sup>2</sup> *Scott v. Watson*, 12 Casey 342.

<sup>3</sup> *Faunce v. Lesley*, 6 Barr 121.

Though the labor of an apprentice working for his master cannot be reached by an execution, for this would be inconsistent with the contract of apprenticeship: *Ibid*.

<sup>4</sup> *Firmstone v. Mack*, 13 Wright 387.

<sup>5</sup> *Hutchinson v. Gormley*, 12 Wright 270.

<sup>6</sup> See *Neff v. Love*, 2 Miles 128. In this case the assignees had filed their account in the Common Pleas, where the matter was still pending, and the court refused to quash the attachment summarily, leaving the garnishees to disclose the facts in their answers.

<sup>7</sup> *Raiguel v. McConnell*, 1 Casey 362.

<sup>8</sup> *Ibid*.

<sup>9</sup> *Robinett v. Donelly*, D. C. Phila., 21 Leg. Int. 37.

<sup>10</sup> *Jones v. Railroad Co.*, 1 Grant 457; *Fithian v. Railroad Co.*, 7 Casey 114.

<sup>11</sup> *City of Erie v. Knapp*, 5 Casey 173; *Buckley v. Eckert*, 3 Barr 369; *Keeley v. Murray*, D. C., Nov. 22d 1851. *Per curiam*. We are satisfied that, upon the principle established in *Buckley v. Eckert et al.*, 3 Barr 368, a municipal corporation cannot be made garnishees in an attachment of execution. The situation of the defendants does not appear to us to be distinguished from that of a sheriff or prothonotary, who has money in his hands as a public officer; and it has been determined that these are not liable to the process of attachment. Great public inconvenience must follow, if these corporations are compelled to answer to the claims of creditors of all the persons with whom they have business or to whom money is payable by them. R. A.

<sup>12</sup> *Morrel v. Bank*, D. C. Phila., 2 Phila. Rep. 61.

loan in his hands,<sup>1</sup> nor public officers such as treasurers of the State, county, municipal corporation, or school board, sheriff, or prothonotary.<sup>2</sup>

In the case of an attachment of a legacy or distributive share, the executor may be made garnishee,<sup>3</sup> or any person in whose hands the interest attached may be;<sup>4</sup> such as the executor's agent who has sold the land and received the money,<sup>5</sup> or the executor's vendee.<sup>6</sup> And a legacy to one of two executors, payable out of the proceeds of real estate to be sold by them after the death of testator's widow, may be attached in their hands by a creditor.<sup>7</sup> When a judgment is attached the defendant is made garnishee. If execution has been sued out and levied under the judgment before it is attached, the officer who made the levy should be notified of the attachment;<sup>8</sup> after the money has been made it cannot be attached in the sheriff's hands.<sup>9</sup>

Where a debt in suit is attached the defendant is made garnishee, and the attaching plaintiff, if he establish his title to it, may prosecute it to execution by marking the action to his use.<sup>10</sup>

*Effect.*—An attachment-execution prosecuted to judgment against the garnishee is not satisfaction of the debt, either in favor of the debtor or a subsequent judgment-creditor.<sup>11</sup>

Where it lies and is duly served, it places the attaching creditor in the same relation to the garnishee as was occupied by the defendant before the attachment was laid.<sup>12</sup> It interferes in no way with any right of the garnishee, but leaves to him all the rights of set-off, defalcation, or defence incident to the relations existing between him and the defendant at the time of the service.<sup>13</sup> The attaching creditor stands in the shoes of the defendant; and any equities that could be set up against the latter are equally available against the former.<sup>14</sup> It is in effect an equitable assignment of the thing attached; a substitution of the plaintiff for the defendant to the latter's rights against the garnishee:<sup>15</sup> and in case of a debt, it, as in other assignments, carries with it the right to use all securities for the recovery of the debt: therefore, where a judgment is attached, the plaintiff may claim under such judgment the proceeds of the sale of the real estate of the debtor therein.<sup>16</sup>

<sup>1</sup> Morrel v. Bank, D. C. Phila., 2 Phila. Rep. 61.

<sup>2</sup> Buckley v. Eckert, 3 Barr 369. As regards sheriffs, this is subject to qualification.

<sup>3</sup> Act 13th April 1843, § 10, Purd. Dig. 435, pl. 35, Pamph. L. 235.

<sup>4</sup> Gochenaur's Executors v. Hostetter, 6 Harris 414.

<sup>5</sup> Ibid.; Chambors v. Baugh, 2 Casey 105.

<sup>6</sup> Brady v. Grant, 1 Jones 361; Baldy v. Brady, 3 Harris 103.

<sup>7</sup> Zimmerman v. Briner, 14 Wright 535.

<sup>8</sup> See Winternitz's Appeal, 4 Wright 490.

<sup>9</sup> Fretz v. Heller, 2 W. & S. 400; Crossen v. McAllister, 2 P. L. J. 199.

<sup>10</sup> Crabb v. Jones, 2 Miles 130; Sweeney v. Allen, 1 Barr 380.

<sup>11</sup> Campbell's Appeal, 8 Casey 88; Glenn v. Davis, 2 Grant 153.

<sup>12</sup> Reed v. Penrose's Executors, 2 Grant 472; Fessler v. Ellis, 4 Wright 248.

<sup>13</sup> Myers v. Baltzell, 1 Wright 491.

<sup>14</sup> Patten v. Wilson, 10 Casey 299; Strong's Executor v. Bass, 11 Casey 333.

<sup>15</sup> Reed v. Penrose's Executors, 2 Grant 472.

<sup>16</sup> Fitzsimmons's Appeal, 4 Barr 248. See Fox v. Foster, 4 Barr 119.

Where there are two debts due from the garnishee only one of which is attachable, and payments have been made on account without appropriation by the parties, the law will, for the benefit of the attaching creditor, appropriate such payments to the debt which is not attachable.<sup>1</sup>

But the attaching creditor can acquire no claim against the garnishee superior to that of the debtor himself; and, therefore, if a debtor of a firm, at the request of the settling partner after a dissolution, gives his note payable to a creditor of the firm, the debt cannot be attached by another creditor of the firm; it is discharged by the note.<sup>2</sup>

From the time of the service of the writ, all debts, and all deposits of money, and all other effects belonging or due to the defendant by the garnishee, are bound by it in the garnishee's hands, as in the case of foreign attachment.<sup>3</sup>

It binds money belonging to defendant, which came into the hands of the garnishee after the service of the writ;<sup>4</sup> and this although the defendant, depositing money with the garnishee in his own name, was in fact an agent for others.<sup>5</sup> So it will hold rent becoming due from the tenant-garnishee after service of the attachment.<sup>6</sup> The effect of the attachment as a lien on the fund must be determined by the court which first obtained cognisance of the cause, and not by that out of which the attachment issues.<sup>7</sup>

Where a policy of insurance against fire contained a clause that no suit should be maintained thereon unless brought within six months after the loss, service of an attachment on an insurance company before the expiration of the six months does not excuse the failure to bring suit; but it does not follow that the failure to sue would bar the recovery under the attachment.<sup>8</sup> A foreign attachment suspends the interest on so much of the debt attached as will be required to satisfy the plaintiff's demand.<sup>9</sup> And an attachment-execution has the same effect,<sup>10</sup> unless there be fraud or collusion on the part of the defendant, or wilful delay on the part of the garnishee:<sup>11</sup> and this, though the debt attached was a note not in the name of the defendant in the attachment.<sup>12</sup> The garnishee must retain possession of the thing attached until the attachment is determined: if the holder negotiate a note, attached in his hands as garnishee, it is a fraud upon the law, and the court from which the attachment issued may require the instrument to be placed in such custody as will prevent its improper transfer, taking care that pay-

<sup>1</sup> *Smith v. Brooke*, 13 Wright 151.

<sup>2</sup> *Riddle v. Etting*, 8 Casey 412.

<sup>3</sup> Act 16th June 1836, § 37, *Purd.* Dig. 435, pl. 32, *Pamph. L.* 767.

<sup>4</sup> *Sheetz v. Hobensack*, 8 Harris 412. See *Silverwood v. Bellas*, 8 Watts 420; *Mahon v. Kunkle*, 14 Wright 216.

<sup>5</sup> *Jackson v. Bank of United States*, 10 Barr 61; *Paxson v. Sanderson*, D. C. Phila., 15 Leg. Int. 397; s. c., 3 Phila. Rep. 303.

<sup>6</sup> *Derham v. Berry*, C. P. Phila., 21

Leg. Int. 188.

<sup>7</sup> *Atkinson v. King*, D. C. Phila., 19 Leg. Int. 54.

<sup>8</sup> *Schroeder v. Ins. Co.*, D. C. Phila., 2 Phila. Rep. 286.

<sup>9</sup> *Mackey v. Hodgson*, 1 Am. L. J. 381; s. c. 9 Barr 469.

<sup>10</sup> *Irwin v. P. & C. R. R. Co.*, 7 Wright 488.

<sup>11</sup> *Jackson's Executors v. Lloyd*, 8 Wright 82.

<sup>12</sup> *Ibid.*



ment be demanded at maturity, and, if necessary, proper notice be given to endorsers, the money if paid to be in the place of the note to abide the event of the suit; but if the note be improperly transferred before maturity, and come into the hands of a *bond fide* holder for value without *actual* notice of the attachment, the attachment will not avail against him.<sup>1</sup> Where a debt is attached, the garnishee is restrained from paying over the money, either to his individual creditor, or to the attaching creditor, until the attachment is disposed of, and then only according to the result of such disposal.<sup>2</sup> So, where a judgment is attached by a creditor of the plaintiff, proceedings upon it will be stayed.<sup>3</sup> And where the garnishee suggested an assignment of the debt, and the assignees being summoned, asserted their claim against the attachment, the case became an interpleader, the issue of which the garnishee was bound to await before paying the money: and he was not in fault in not paying the fund into court, when he had not been ruled to do so by the assignees.<sup>4</sup>

The garnishee cannot relieve himself by paying the money into court, in a case where he was not entitled to do so.<sup>5</sup> But it seems that the court, in a proper case, might relieve the garnishee by compelling the plaintiff to proceed.<sup>6</sup> And, recently, it seems to be

<sup>1</sup> Kieffer v. Ehler, 6 Harris 388.

<sup>2</sup> Ege v. Koontz, 3 Barr 109.

<sup>3</sup> Paxson v. Sanderson, D. C. Phila., 8 Leg. Int. 54; s. c., 3 Phila. Rep. 303; Daly v. Derringer, Monday, March 1st 1852. Why proceedings should not be stayed. The ground upon which this application is based is, that since the judgment, the debt has been attached in the hands of the defendant by a judgment-creditor of the plaintiff. It is plausible to say that in such case the money may be made upon the execution, and paid into court, but there would be found to be practical difficulties in the way of such proceeding; without adverting to other difficulties, a voluntary payment by the defendant to the sheriff, or into court, would be in effect the same as a payment to the plaintiff. The attachment is no lien upon any particular money or property. It is clear that the defendant is entitled to an *audita querela*, and it is expedient to give relief summarily on motion, rather than to put the parties to that writ. If the money were paid into court, it would, in general, be necessary to refer it to an auditor, and the delay and expense would be much greater than for the defendant to appear, answer, and submit to a judgment on the attachment; the plaintiff being a party to that proceeding, can intervene to expedite it. Should there be questions arising out of assignments, &c., so much the more reason for leaving such questions to be

decided in the regular course, rather than upon a question of distribution, in which it would be very doubtful what the effect would be upon the several claims. Rule absolute.

<sup>4</sup> Irwin v. P. & C. R. R. Co., 7 Wright 488.

<sup>5</sup> Baldy v. Brady, 3 Harris 103.

<sup>6</sup> Pretz v. Northampton Bank; Anspach v. Northampton Bank, D. Ch., December 4th 1849. Why plaintiff should not proceed, or the attachment be dissolved. *Per curiam*. These are cases of attachment of execution which have been pending many years. One of the garnishees being sued, not by the defendant in the attachment, but by a third person claiming the debt attached adversely in the Supreme Court, he put in an affidavit of defence, alleging, it is said, the pendency of this attachment; whereupon that court gave judgment, but stayed the execution. If the affidavit in that case contained an allegation that the note in suit was claimed to be the property of another, as whose it had been attached, this court would have considered the affidavit sufficient, and either sent the case to a jury to determine the question to whom the note or debt belonged, or, upon the money being brought into court, awarded an interpleader between the claimants. It has been held, in the Supreme Court, that an attachment-execution is pleadable in bar: Maynard v. Nekervis, 9 Barr 81. And if a debtor is threatened

the practice for the garnishee who has no defence, to apply for leave to pay the money into court, where conflicting claims to it will be adjusted.<sup>1</sup>

The garnishee debtor may claim the benefit of the Exemption Law; and the claim must be made against the attaching creditor, though it has already been made against the original creditor, the defendant in the attachment.<sup>2</sup>

*Relations of garnishee with defendant.*—The law only requires of the garnishee that in good faith he shall see that the money is recovered against him in *due course of law*. Where there is no fraud or collusion on his part, a recovery against him is a good defence to an action by the defendant or his assignee.<sup>3</sup> It is not sufficient evidence of collusion that he employed the attorney of the attaching creditor to draw up his answers.<sup>4</sup> But he is bound to contest the claim of the attaching creditor, and payment before judgment against him is no defence to an action by the defendant in the attachment.<sup>5</sup> So, where the judgment on which the attachment issued was invalid, payment by the garnishee to the attaching creditor is no defence to the claim of the defendant in the attachment.<sup>6</sup> But where the garnishee notified the defendant to appear and defend, but defendant suffered judgment to go against him, the garnishee is not bound to defend on the ground that the attachment was erroneously issued.<sup>7</sup>

In a suit by the defendant or his assignee against the garnishee, the pendency of the attachment should in general be pleaded in abatement until satisfaction, when it is a bar *pro tanto*.<sup>8</sup> But in *covenant* the defendant may plead an attachment-execution which has been served on him as garnishee, though such plea be neither in abatement nor in bar of the suit; it is admissible to place the facts upon the record, in order that the judgment may be qualified accordingly, and it is especially proper when the proceedings are before different courts.<sup>9</sup> To a plea in abatement of the pendency of a foreign attachment, a replication that the chose was assigned prior to the service of the attachment, is good.<sup>10</sup> He is not liable to the defendant for interest on the debt due him during the pendency of the attachment; the defendant has his remedy for interest against

with contradictory claims to the same thing, whether attempted to be enforced by suit or attachment, he is surely entitled to relief. It is not, however, our intention to examine whether the course adopted in the Supreme Court, or that which we have indicated, is the most consonant with sound practice. All that we decide at present is against the application now made, on the ground that sufficient evidence of the interest of the party now applying has not been laid before us. R. D.

<sup>1</sup> See *McBroom's Appeal*, 8 Wright 92.

<sup>2</sup> *Strouse's Executor v. Becker*, 2 Wright 190; *Same v. Same*, 8 Wright 206.

<sup>3</sup> *Anderson v. Young's Executors*, 9 Harris 443.

<sup>4</sup> *Swanger v. Snyder*, 14 Wright 218.

<sup>5</sup> *Stoner v. Commonwealth*, 4 Harris 387.

<sup>6</sup> *Calhoun v. Logan*, 10 Harris 47.

<sup>7</sup> *Swanger v. Snyder*, 14 Wright 218.

<sup>8</sup> *Fitzsimmons's Appeal*, 4 Barr 248; *Derham v. Berry*, C. P. Phila., 21 Leg. Int. 188; *Nav. Co. v. Nav. Co.*, D. C. Phila., 15 Leg. Int. 325; s. c., 3 Phila. Rep. 214. *Semble* it should be pleaded in bar: *Maynard v. Nekervia*, 9 Barr 81; *Sav. Inst. v. Smethurst*, 2 Miles 439.

<sup>9</sup> *Kase v. Kase*, 10 Casey 128.

<sup>10</sup> *Nav. Co. v. Nav. Co.*, D. C. Phila., 15 Leg. Int. 325; s. c., 3 Phila. Rep. 214.

the wrongful litigant, and *it seems*, if he appears and interpleads to the attachment, he may recover it if the attachment be decided against the plaintiff.<sup>1</sup> Where the debt attached is greater than the amount of the attachment, interest during the pendency of the attachment is chargeable only on the excess.<sup>2</sup>

*Sheriff's right to indemnity.*—At common law, where the defendant's property in goods is disputed, the sheriff has a right to indemnity before seizing them in execution, and this principle applies to seizures under foreign attachment, or attachment-execution, so as to protect the sheriff, and through him the garnishee, where the sheriff makes the latter his bailee, pending the process; the plaintiff and the sheriff cannot, by a mere copy-service of the writ, escape the risks of the attachment, and throw them on the garnishee, by requiring him to retain the goods when the title to them is in dispute; and therefore where the garnishee notified the sheriff that the goods were claimed as the property of another person, and the sheriff, being refused indemnity by the plaintiff, gave notice to the garnishee that he had no claim upon the goods, it was held on the *scire facias* against the garnishees that the latter were not liable as bailees of the sheriff.<sup>3</sup>

*Effect as to strangers.*—The attachment will bind the goods as against a subsequent levy, and a sale under the attachment will confer a valid title to the vendee as against one who purchased at a prior sale under a levy made subsequently to the attachment.<sup>4</sup> Judgments against the vendor of land, who retains the legal title as security for the unpaid purchase-money, being liens attaching not only on the naked legal title, but also on the unpaid purchase-money, whether secured by bond or otherwise, cannot be disturbed by an attachment, subsequently issued for the money due by the vendee, upon a judgment subsequently rendered against the vendor.<sup>5</sup> And the lease of land, with an assignment of the rents in trust to pay debts, does not require to be recorded, and is good against a subsequent attachment-execution.<sup>6</sup> And an assignment of a *chose in action* by a debtor, recognised as valid by him in his answers to interrogatories in a prior attachment, is good against a subsequent attaching creditor.<sup>7</sup>

There is no rule of law which compels the real owner of attached property, on notice of the suit, to come in and defend *pro interesse suo* on pain of forfeiting his rights of property or action.<sup>8</sup> But it has been held that where a debt is attached after it has been assigned, the garnishee may give notice of the attachment to the assignee, and he must come in and defend for his interest.<sup>9</sup> But where, in foreign attachment, the goods are ordered to be sold as perishable or chargeable, the title of the purchaser at such sale is indefeasible and unquestionable, whoever the owner may have been, because the

<sup>1</sup> Mackey v. Hodgson, 9 Barr 469; Irwin v. P. & C. R. R. Co., 7 Wright 491, per LOWRIE, C. J.

<sup>2</sup> Jackson's Executors v. Lloyd, 8 Wright 82.

<sup>3</sup> Shriver v. Harbaugh, 1 Wright 399. This was in foreign attachment.

<sup>4</sup> Harbison v. McCartney, 1 Grant 172.

<sup>5</sup> Stewart v. Coder, 1 Jones 90.

<sup>6</sup> Rodel v. The Railroad, D. C. Phila., 15 Leg. Int. 325.

<sup>7</sup> Miller v. Ins. Co., D. C. Phila., 19 Leg. Int. 38.

<sup>8</sup> Megee v. Beirne, 3 Wright 50. Foreign attachment.

<sup>9</sup> Wilcock v. Neel, D. C. All., 1 Phila. Rep. 129.

order and sale were a proceeding *in rem*; but in trespass, by the real owner against the sheriff, for taking the goods, the sheriff cannot justify on the ground that the title of his vendee was validated by this peculiar rule of law.<sup>1</sup>

A bill of interpleader will not lie to settle the relative rights of different parties to a fund which has been attached in two different suits.<sup>2</sup>

*Practice.*—The practice in attachment-execution is by its origin and by analogy assimilated to the practice in foreign attachment, and we shall therefore feel warranted in filling up deficiencies which may exist in the authorities, by borrowing illustrations from that more perfect system.<sup>3</sup> In fact, though the attachment-execution is a proceeding of purely legislative origin, the legislation upon the subject is singularly incomplete, and the procedure as a system may be said to be due entirely to the plastic hand of judicial discretion. One point is important to be remembered, in proceedings by attachment-execution the existence and amount of the debt have already been ascertained in a previous suit, whereas in foreign attachment the plaintiff has to establish his demand against the defendant, as well as to reap the fruits of his judgment from the property in the hands of the garnishee. The analogy between the two proceedings, therefore, is confined to the process against the garnishee. The defendant, so important a character in foreign attachment, hardly appears at all upon the stage in attachment-execution.

The writ is sued out by means of a *præcipe* in the usual manner.<sup>4</sup>

*When the writ may issue.*—The general rule is that a plaintiff may have as many executions at the same time as the law affords, and pursue each until satisfaction is obtained upon one: therefore it was error for the court to set aside an execution-attachment against bank stock belonging to the defendant, standing on the books of the corporation in the name of another, on the ground that a previous attachment upon the same judgment against deposits was still outstanding.<sup>5</sup> And an attachment may issue pending a *fi. fa.*, if no levy has been made on it.<sup>6</sup> But after levy and condemnation of land under a *fi. fa.*, an attachment-execution will not be sustained on motion to quash.<sup>7</sup> And after a *venditioni exponas* has been returned stayed as to some of the premises levied upon, an attachment-execution cannot issue without leave of the court.<sup>8</sup>

If both *fi. fa.* and attachment are served, the defendant may elect which shall be set aside.<sup>9</sup>

An attachment in one State of the Union is no bar to the right to issue another writ elsewhere, even where the assets bound are sufficient for the payment of the demand on which both are founded.<sup>10</sup>

<sup>1</sup> Magee v. Beirne, 3 Wright 50.

Davies v. Scott, 2 Miles 52.

<sup>2</sup> Smith v. Harper, D. C. Phila., Sept. 1847.

<sup>3</sup> Hallowell v. McClay, C. P. Phila., 3 Phila. Rep. 261.

<sup>4</sup> Keeler v. Knapp, 1 Barr 213.

<sup>5</sup> Farr v. Carlton, D. C. Phila., 17 Leg. Int. 109.

<sup>6</sup> See Form of *Præcipe*, Smith's Forms, 369, pl. 13.

<sup>7</sup> Grant v. Potts, 2 Miles 164.

<sup>8</sup> Pontius v. Nesbit, 4 Wright 309.

<sup>9</sup> Parsons v. Col. Ins. Co., 2 Phila. Rep. 21.

<sup>10</sup> Tams v. Wardle, 5 W. & S. 222. See Wray v. Tammany, 1 Harris 394;

It may issue after the lapse of five years from the rendition of the original judgment, without a previous *sci. fa.* to revive;<sup>1</sup> and whether the judgment was prior or subsequent to the Act of 1836.<sup>2</sup> It cannot issue on a justice's transcript filed in the Common Pleas, till a prior return of "*nulla bona*" has been made.<sup>3</sup> So on a judgment against husband and wife, it cannot issue against the wife until after an execution against the husband has been returned "*nulla bona*."<sup>4</sup>

It cannot issue on an award until final judgment, or the expiration of the twenty days allowed for appeal.<sup>5</sup> And the court on application will set aside an attachment against an insolvent debtor, issued before the expiration of the exemption ordered.<sup>6</sup>

But an execution to attach a debt due from an insolvent estate is not premature, although laid before the final settlement of the executor's account, or decree of distribution.<sup>7</sup>

Before an *alias* can be regularly issued, the first writ must be disposed of and returned.<sup>8</sup>

*Form of the writ.*—This writ is authorized by the 35th section of the Act of 16th June 1836,<sup>9</sup> which enacts that the choses in action therein enumerated "may be attached and levied in satisfaction of the judgment, in the manner allowed in the case of a foreign attachment: but in such case a clause in the nature of a *scire facias* against a garnishee in a foreign attachment shall be inserted in such writ of attachment, requiring such debtor, depositary, bailee, pawnee, or person holding the demise as aforesaid, to appear at the next term of the court, or at such other time as the court from which such process may issue shall appoint, and show cause why such judgment shall not be levied of the effects of the defendant in his hands." It is not necessary to suggest in the writ the nature of the property to be attached; the act prescribes the writ in general terms.<sup>10</sup>

The clause of *scire facias* should not embrace the defendant's name, but merely the garnishee's; though the defendant's name if added is not erroneous, but merely surplusage.<sup>11</sup>

Several garnishees owing distinct debts to the defendant may be joined in one writ.<sup>12</sup>

The writ may be amended by the *præcipe* so as to make it returnable to the first day of the term, instead of to a monthly return day.<sup>13</sup>

It seems it may be made returnable on the second return day of the next term.<sup>14</sup>

<sup>1</sup> Ogilby v. Lee, 7 W. & S. 444; Gemmil v. Butler, 4 Barr 232; Heebner v. Chave, 5 Barr 115.

<sup>2</sup> Bank v. Ralston, 7 Barr 482. This was formerly doubted (Burnham v. Justus, 2 Miles 420), though it was admitted that a revival cured the defect: Hall v. Geyer, 2 Miles 321.

<sup>3</sup> Clevensline v. Law, 5 P. L. J. 459. BELL, J. See Moore v. Risdon, Ibid. 429; Guerin v. Guest, 4 P. L. J. 471; Hitchcock v. Long, 2 W. & S. 170.

<sup>4</sup> Franklin v. Rush, D. C. Phila., 1 Phila. Rep. 571.

<sup>5</sup> Wray v. Tammany, 1 Harris 394.

<sup>6</sup> McHenry v. Burnett, D. C. Phila. 1 Phila. Rep. 297.

<sup>7</sup> Chambers v. Baugh, 2 Casey 105.

<sup>8</sup> Purdon v. Purdon, 2 Miles 173.

<sup>9</sup> Purd. Dig. 434, pl. 30, Pamph. L. 767.

<sup>10</sup> Layman v. Beam, 6 Whart. 184.

<sup>11</sup> Ibid.

<sup>12</sup> Cornelius v. Simpson, C. P. Bucks, 3 Phila. Rep. 35.

<sup>13</sup> Mess v. Herring, 2 Miles 93.

<sup>14</sup> Schober v. Mather, 13 Wright 22.

*Service. Upon the defendant.*—The writ is to be served like a summons in personal actions.<sup>1</sup>

By the Act of 29th April 1844, where the defendant resided out of the county, or service could not be made upon him by the officer within his bailiwick, the attachment was made valid though the defendant had not been served,<sup>2</sup> except where prior to that act the garnishee had paid the defendant, or returned to him the goods, &c., in his possession, or where *bond fide* assignments had been made to third persons without notice of the attachment.<sup>3</sup> And now service on the defendant is not required when he does not reside in the county in which the attachment issued.<sup>4</sup> And it is not necessary that the sheriff should specially negative the fact of residence; his return of "*nihil*" is sufficient.<sup>5</sup> Where the defendant resides in the county, a copy of the writ must be served upon him in the same manner as the summons in personal actions.<sup>6</sup> A return of *non est inventus* as to the defendant is not a sufficient service.<sup>7</sup> The court will not go into evidence to prove the falsity of a return of *nihil* against the defendant, except when the defendant comes and shows a defence on the merits.<sup>8</sup> Where the defendant has entered an

<sup>1</sup> Act 16th June 1836, § 36, Purd. Dig. 435, pl. 31, Pamph. L. 768.

<sup>2</sup> Pamph. L. 512.

<sup>3</sup> By Act 15th March 1847, Pamph. L. 397. But an assignee in bankruptcy is not within the exception requiring notice to be given to *bond fide* assignees: Cowden v. Pleasants, 9 Barr 59.

<sup>4</sup> Act 20th March 1845, § 4, Purd. Dig. 436, pl. 37, Pamph. L. 189.

<sup>5</sup> Murphy v. Burke; Bencke v. Frick, *infra*.

<sup>6</sup> Act 16th June 1836, § 36, Purd. Dig. 435, pl. 31, Pamph. L. 768; Corbyn v. Bollman, 4 W. & S. 343; Moorhead v. Harwood, 3 P. L. J. 302.

<sup>7</sup> Hains v. Viereck, C. P. Phila., 2 Phila. Rep. 40; Corbyn v. Bollman, 4 W. & S. 343.

<sup>8</sup> Murphey v. Burke, D. C., Saturday, March 30th 1850. Why attachment-execution should not be set aside. *Per curiam*. This attachment was issued November 10th 1849, and on the same day was served on the garnishee. On November 12th 1849, the defendant died. As to him, the sheriff returned *nihil habet*. We have recently had occasion to examine the question of the form of the sheriff's return. The court will not go into oral evidence to prove its falsity, unless, indeed, in a single case, where a defendant comes in, and, showing a defence on the merits, asks to be let in. Now, here the only question is the true meaning of *nihil habet*. Does it mean "that service cannot be, or could not have been, made upon

such defendant by the officer within his bailiwick"? We think it is equivalent to that, and that it is not necessary that the sheriff should, in his return, specially negative the fact of residence. R. D.

Bencke v. Frick, D. C. Saturday, June 10th 1848. Why the attachment should not be set aside. *Per curiam*. In this case an attachment of execution was issued, to which the sheriff returned as to the defendant, *nihil habet*. The garnishee appeared, and, upon his answers, a judgment in favor of the plaintiff was duly rendered. This is a motion by the defendant to set aside the attachment on the ground that there was no service upon him, and that, in point of fact, at the time the writ issued and judgment was entered, he was resident of the county of Philadelphia, being an inmate of the Blockley Almshouse.

Much ingenuity has been displayed on the point whether the defendant had a legal residence within the county. We do not deem it necessary to consider that question. The sheriff's return is conclusive that defendant is not a resident. It is true we are in the practice, in the exercise of a legal discretion, of relieving parties from the consequences of a false return, where they are really injured. Thus, in the common case of a summons returned "served," and a judgment by default, upon proof that the defendant in fact had no notice, made timely application for relief, and has a defence, we inva-

appearance *de bene esse*, and moved to open the original judgment, he cannot complain of want of notice, for without an appearance he could not have been heard on his motion.<sup>1</sup>

Where the defendant, who resided out of the county, was not served, but was notified by the garnishee to appear and defend, and suffered judgment to go against him, he cannot afterwards object that the attachment was erroneously issued.<sup>2</sup>

*Upon the garnishee.*—The officer must also serve a copy of the writ, in the same manner as is done in the summons in personal actions, upon every person and corporation, within his proper county, named in the writ.<sup>3</sup> And the proceedings may be sustained where the garnishee is within the jurisdiction when served, and the goods are in his possession or that of his agent, though they were beyond the jurisdiction, at the time of service.<sup>4</sup> It has been doubted whether an attorney can accept service of the attachment, but appearance waives defects in service;<sup>5</sup> and cures the want of service.<sup>6</sup>

At common law the sheriff has a right to indemnity before seizing goods on an execution, where the defendant's property in them is disputed: and this principle extends to seizures under foreign or execution attachment, so as to protect the sheriff, and through him the garnishee, where the sheriff makes the latter his bailee, pending the process: the plaintiff and the sheriff cannot, by a mere copy-service of the writ, escape the risks of the attachment and throw them on the garnishee, by requiring him to retain the goods, when the title to them is in dispute: a garnishee in whose possession certain bales of wool were attached, notified the sheriff that they were claimed as the property of another person. The sheriff demanded indemnity from the plaintiff, and, upon its being refused, gave notice to the garnishee that he had no claim upon the goods: *Held*, on the *scire facias* by the plaintiff against the garnishees, that the latter were not liable as bailees of the sheriff.<sup>7</sup>

Where third parties claim a fund which has been attached in execution, the garnishees may be treated as stakeholders, and the claimants admitted to interplead.<sup>8</sup>

Where a note deposited in pawn is attached as the property of the owner, it is proper to set out in the return the nature of the property attached.<sup>9</sup> The court have power to allow the sheriff to amend his return.<sup>10</sup> The form of a return may be found in Smith.<sup>11</sup>

*Appearance* by the garnishee is necessary, if he wishes to defend the attachment. A default to appear is tantamount to a confession

riably open the judgment, and let the defendant into a defence. Here, it is not alleged that the defendant has any defence; no injury has been done; a portion of his property, in the hands of his garnishee, will be applied in discharge of a just debt. There is nothing, therefore, in the case, which calls for the exercise of our discretionary powers, and the proceedings on their face are regular. Rule dismissed.

<sup>1</sup> Skidmore v. Bradford, 4 Barr 296.

<sup>2</sup> Swanger v. Snyder, 14 Wright 218.

<sup>3</sup> Act 16th June 1836, § 36, *ubi supra*.

<sup>4</sup> Childs v. Digby, 12 Harris 23.

<sup>5</sup> Lorenz's Administrator v. King, 2 Wright 93.

<sup>6</sup> Fox v. Reed, 3 Grant 81.

<sup>7</sup> Shriver v. Harbaugh, 1 Wright 399.

<sup>8</sup> Brady v. Grant, 1 Jones 361. *See contra*, Snyder v. Wetherly, D. C. Phila., 1 Phila. Rep. 325.

<sup>9</sup> Rhoads v. Megonigal, 2 Barr 39, per ROGERS, J.

<sup>10</sup> Layman v. Beam, 6 Whart. 181.

<sup>11</sup> Sm. Forms 370, pl. 14.

that he has the attached goods in his hands.<sup>1</sup> The judgment to be taken against the garnishee for want of appearance is not to be general, but that the plaintiff have execution of so much of the debt, &c., due by the garnishee to the defendant, and attached in his hands, as may satisfy the judgment of the plaintiff, with interest and costs; and if the garnishee refuse or neglect on demand by the sheriff to pay the same, then the same to be levied of his the garnishee's goods, lands, and person according to law, as in the case of a judgment against him for his proper debt; and that the garnishee be thereupon discharged as against the defendant of the sum so attached and levied.<sup>2</sup>

A general appearance by the garnishee is a waiver of all defects in the writ and the service: and even if the making the writ returnable on the second return day of the term were irregular, the garnishee cannot make the objection after a general appearance.<sup>3</sup>

Judgment against the garnishee for want of appearance, will be opened if promptly applied for and defence is shown.<sup>4</sup>

*The interrogatories.*—By analogy to the proceedings in foreign attachment, the plaintiff may exhibit in writing to every garnishee all such interrogatories as he may deem necessary, touching the estate

<sup>1</sup> Layman v. Beam, 6 Whart. 185.

<sup>2</sup> Ibid.

<sup>3</sup> Schober v. Mather, 13 Wright 21.

<sup>4</sup> Wray v. Winner, D. C. Phila., 1 Phila. Rep. 336; Nicholson v. Fitzpatrick, C. P. Phila., 2 Phila. Rep. 205. Carlin v. Cavanaugh, D. C., Saturday, March 18th 1848. Why execution should not be set aside, judgment opened, and garnishee let into a defence. *Per curiam.* This was an attachment of execution, which, upon the 24th December 1847, was served on the Franklin Fire Ins. Co. No appearance was entered, and upon the 28th February 1848, a judgment was rendered against the garnishee for want of appearance. The affidavit shows a defence by the garnishees, and the application by them to open the judgment is in time. It is barely possible that the plaintiff, by waiving interrogatories, could have had a trial at December term; but it is not the ordinary course. Besides, the court will exercise more liberality in favor of a garnishee (who is a stranger, and involved in a litigation between the defendant and his creditors, without any default on his part) than of an original party. Rule absolute.

Small v. Hurlbut, defendant—Todd, garnishee, March 10th 1849. Why judgment should not be opened. *Per curiam.* This was attachment of execution, and judgment by default was entered against the garnishee for want

of appearance. It is the practice of the court, in all cases of judgment by default, to open them where the defendant comes in promptly, makes some excuse for his default, and shows a good defence. The court is even more liberal in regard to garnishees than other defendants; for they are strangers to the controversy, and made parties to a lawsuit, from the mere fact that they happen to have, or the plaintiff supposes they have, money which belongs to the defendant, and which, if they have, they may be ready and willing to pay on demand. Here the garnishee says, he knew neither of the parties, had no knowledge of defendant, and, of course, no knowledge of any money belonging to him in his hand. In point of fact, the allegation is, that he is the maker of a promissory note of which the defendant is the holder, which might very well be without garnishee knowing it. The excuse for not appearing is indeed a very slight one—perhaps badly expressed, viz., that it was more from inadvertence, than any other cause, that he did not appear. But we are never very strict in these cases; the neglect or inadvertence of counsel has, time and again, been admitted as an excuse, and we see not why the same privilege should not be allowed to the party, where, as here, he is not sued for a debt or tort of his own, but dragged into a controversy between other persons. R. A.



and effects of the defendant in his possession or charge, or due and owing from him, as the case may be, to the defendant, at the time of the service of such writ, or at any other time, and cause the same to be filed of record in the cause; and upon filing such interrogatories the court, upon motion of the plaintiff, will grant a rule upon the garnishee, to appear before the court at a time and place therein named, and exhibit in writing, under his oath or affirmation, full, direct, and true answers to the interrogatories so filed, or such of them as the court shall deem pertinent and proper.<sup>1</sup>

In the District Court of Philadelphia the plaintiff enters an office rule on the garnishee to answer on twenty days' notice.<sup>2</sup> It is sufficient service of such rule to leave a copy at the dwelling-house of the garnishee with an adult member of his family.<sup>3</sup> A mistake of the clerk in the date of the entry of the rule is amendable at any time, and forms no ground to reverse the judgment.<sup>4</sup>

If the garnishee neglect or refuse to comply with the rule, after it has been duly served, the court will give judgment against him, and he will be adjudged to have in his possession goods and effects of the defendant, liable to attachment, to an amount sufficient to satisfy the demand of the plaintiff, together with legal costs of suit and charges, and execution may thereupon issue against him *de bonis propriis*.<sup>5</sup>

*Answers.*—If the answers are not "full and distinct," judgment may be rendered against the garnishee on that ground;<sup>6</sup> or the garnishee may be allowed to file a supplemental answer.<sup>7</sup> The garnishee is not necessarily obliged to annex to his answers copies of the correspondence between him and the defendant; and in general the court will relieve him from so doing.<sup>8</sup>

The garnishee need not answer irrelevant or frivolous interrogatories. Thus, a justice of the peace need not answer as to the number, amount, and time of entry of judgments on his docket in favor of the defendant in the attachment; the interrogatories must

<sup>1</sup> See "Foreign Attachment Law" 13th June 1836, §§ 55, 56, *Purd. Dig.* 494, pl. 16, 17, *Pamph. L.* 582.

<sup>2</sup> *Wiener v. Davis*, 6 P. L. J. 567.

<sup>3</sup> *Mohr v. Warg*, 2 *Casey* 106.

<sup>4</sup> *Ibid.*

<sup>5</sup> Act 13th June 1836, § 57, *Corbyn v. Bollman*, 4 W. & S. 342.

<sup>6</sup> *Fithian v. Brooks*, D. C. Phila., 1 Phila. 260.

<sup>7</sup> *Jones v. Hacker*, D. C. Phila. Sept. 22d 1849. Rule for judgment against garnishees. *Per curiam*. This was a rule to show cause why judgment should not be entered against garnishee for want of "full, direct, and true" answers. The answers are objected to as not being sufficiently full and direct. It appears upon the whole answer taken together, that the original defendant being indebted to the garnishee had placed in his hands certain securities

as absolute payment of the debt, which were received as such, and the defendant discharged. The plaintiff asks what these securities were. This the garnishee has avoided, or refused to answer. We think the plaintiff has a right to a full and direct answer to the interrogatories, so as to be informed of the true nature of the transaction between the debtor and garnishee. It may be that the garnishee is thus compelled to discover effects now exclusively his own, and in which the debtor has no interest, but they were once the property of the debtor, and to say that the garnishee is excused in such a case from answering, is to afford the means of a very convenient cover and concealment to the grossest frauds upon creditors.

<sup>8</sup> *Duffield v. Morri*, 4 P. L. J. 79.

concern the estate or effects of the defendant in his hands, or debts due by him to the defendant;<sup>1</sup> but where he will not answer the interrogatories at all, a judgment against him, "that he has in his possession goods and effects of the defendant to an amount to satisfy the demand of the plaintiff, together with all legal costs and charges," is good.<sup>2</sup>

A demurrer by plaintiff to garnishee's answers is not an improper form of setting the case down for hearing on the answers; it has no other purpose or effect.<sup>3</sup>

If the answers contain nothing more than a denial of the facts charged, the plaintiff is no more bound by it than he would be by a denial in an answer to a bill in chancery, and he is not precluded from going before a jury to make out the proofs *aliunde*.<sup>4</sup>

If the garnishee admits by his answer certain effects in his hands, it is equivalent to a tender of them to answer the purposes of the process.<sup>5</sup> In such case the plaintiff may take judgment at any time for the amount admitted to be due, which is a judgment *quasi in rem* against the funds or effects in the hands of the garnishee.<sup>6</sup> But such judgment will not be given unless the answers contain a distinct admission of funds in possession, or of such facts as leave the possession of such funds a mere inference of law.<sup>7</sup> And where an

<sup>1</sup> Corbyn v. Bollman, 4 W. & S. 342.

<sup>2</sup> Ibid.

<sup>3</sup> Fox v. Reed, 3 Grant 81.

<sup>4</sup> Hess v. Shorb, 7 Barr 231.

<sup>5</sup> Newlin v. Scott, 2 Casey 103.

<sup>6</sup> Ibid.

<sup>7</sup> Fithian v. Brooks, D. C. Phila., 1 Phila. Rep. 260. Mercer v. Whitaker, D. C., Dec. 9th 1848. Rule for judgment against garnishees. *Per curiam*. It is a rule of practice of the court, intended for the protection of garnishees against the claims of those whose funds or effects they have in hand, never to render a judgment against them upon answers filed, unless those answers contain either a distinct admission of funds in possession, or of such facts as leave the possession of such funds a mere inference of law. In this case, so far as any point has been pressed upon us, the answers of the garnishee show these facts: The defendants, in the judgment upon which the attachment of execution in this case issued, on the 19th of November 1847, executed to the garnishee two assignments of their estate in Delaware and Maryland, for the benefit of their creditors. These assignments were not recorded in Philadelphia, where the assignors resided, and we may assume that they were void as to the creditors, according to Weber v. Samuel, 7 Barr 499. Yet, it is clear that they were good between the parties, and passed the legal title to the assignee: Seal v.

Duffy, 4 Barr 274. Under these assignments the garnishee has received certain assets. Before the attachment in this case was laid, however, he had incurred certain liabilities to the creditors of the defendants, under the authority of their assignments, to the amount of \$6816. This is more than sufficient to cover all the money at present in his hands. It is distinctly averred that these liabilities were incurred in execution of the assignment, being in effect, as we understand it, in payment of debts of assignors, in anticipation of the receipt of funds under the assignment by the garnishee's own paper, received by the creditor in satisfaction. We are not prepared, as a point of law, to say, that the garnishee cannot protect himself by funds afterwards received. It will be a question for a jury, as we are at present advised, whether these acts of the garnishee were honestly in the execution of his trust.

As to the securities, or policies of insurance, which he recovered—the balance, after paying his advances, whatever it may be—has passed under an assignment made by him, to James W. Harriess, on the 26th of February 1848, before the attachment was laid, in trust for the creditors of the defendants, Adams & Co. It may be that this transfer has not cured the fault in the non-recording of the original assignment; and it may be that the

assignee, under an unrecorded deed of assignment for the benefit of creditors, being summoned as garnishee, admitted that he held book-accounts, and other evidences of debt uncollected, most of which he considered worthless, no judgment could be entered against him for the amount of such accounts.<sup>1</sup> So, where the garnishees admitted in their answers that they held property of the defendant more than sufficient to pay a debt which defendant owed them, if commercial adventures turned out well, the plaintiff was not entitled to judgment on the answers.<sup>2</sup>

Where the answer shows that the garnishee holds goods which have been pawned, pledged, or demised to him, the court, construing the whole act in relation to executions together, will award that upon the judgment a *fi. fa.* may issue under the provisions of the 23d section, ordering the goods to be sold subject to the rights of the pawnee, who, upon payment of the amount of his claim, would be compelled to yield possession of the goods.<sup>3</sup>

A judgment for the garnishee, on his answer, is improper; the court can do no more than refuse judgment for the plaintiff.<sup>4</sup>

After taking judgment against the garnishee upon his answer,

garnishee could not thus relieve himself from the responsibility of the trust which he assumed. It may be that he will continue liable for the acts and precepts of the new trustee; but has not the title passed by this assignment, and is not James W. Harriss the proper garnishee, who will be entitled to collect and receive the assets? The contrary was not pressed; but it was urged that the liabilities incurred, and advances made by the garnishee, could not be considered, in law, as under and in execution of the assignment, which, we think, as has been stated, to be a question of fact. R. D.

*Fithian v. Brooks*, Dec. 6th 1851. Rule for judgment against garnishees. *Per curiam*. The established practice of the court is not to give judgment against garnishees, unless upon an express admission of assets, or, at least, the admission of such facts, that the possession of assets necessarily results as a question of law. If the answers are not "full and direct," judgment may be rendered against them on that account, but that is a different proceeding, and on different grounds from that pursued here. The answers here clearly set up that the garnishees purchased of the defendants, upon an agreement, or undertaking of both parties, as to the acts of third persons, in which they were disappointed; and that, upon discovery, the terms were modified so that the garnishees were to pay the defendant as soon as it was convenient. Now, however improbable such a story,

though it may have the appearance of fraud on the creditors—though, therefore, the goods, or their proceeds, may be subject to the execution, or attachment of the creditors, it is impossible for us to say that the plaintiffs here are entitled to judgment against the garnishees as for a debt admitted to be due. R. D.

*Roberts v. Steiner*, D. C., Saturday, Nov. 11th 1848. Rule for judgment against garnishees. *Per curiam*. It is a settled practice with the court not to give a judgment against garnishees upon their answers, unless they contain a clear and unqualified admission of funds in hand belonging to defendant, or of facts which make the existence of such funds an inference of law. In this case, it appears that the defendants are a foreign commission-house, of whom the garnishee bought goods, and they have been notified, by a firm in England, that they will hold them responsible for the price. Surely, the garnishees do not mean to admit the funds out of their hands in the face of this notice. We will not look into the letters of the alleged claimants to see whether their claim is consistent with the facts sworn to by the garnishees, for, after all, those letters are mere evidence, not admissions *in judicio*. R. D.

<sup>1</sup> *Raiguel v. McConnell*, 1 Casey 162.

<sup>2</sup> *Kerr v. Diehl*, 4 P. L. J. 112.

<sup>3</sup> *Lamb v. Vansciver*, D. C. Phila., 1 Phila. Rep. 29.

<sup>4</sup> *Hess v. Shorb*, 7 Barr 231.

the plaintiff should not go on to trial and take a verdict; if he does so the judgment on the verdict will be arrested.<sup>1</sup>

If upon the answers fraud is apparent, judgment may be entered against both garnishee and defendant for the amount of the plaintiff's debt.<sup>2</sup>

No provision is made for the case which arises when both the defendants answer the interrogatories denying their liability; and judgment is rendered thereon by the court without any pleading to the *scire facias*, or trial. But by analogy to the case provided for in the 57th section of the Foreign Attachment Act, and from the inference that the defendants have waived the privilege given by the 58th and 59th sections, by omitting to plead, and instead of a trial, submitting to the court's decision on their defence without application for a different course, the judgment on the answers may be against both the defendants and their estate for the amount of the plaintiff's claim. This judgment may, of course, be joint, especially if they do not plead at all, or do not sever in their pleas; and in such case the *fi. fa.* should also be joint.<sup>3</sup>

The answers are the exclusive foundation of the judgment to be rendered thereon, and if they do not disclose facts sufficient to entitle the plaintiff to judgment, it is the duty of the court to refuse judgment, and discharge the rule to show cause.<sup>4</sup> Thus, where the answers of executors admitted a sum of money in hand as the share of the defendant, an heir of the decedent's estate, but averred an assignment to a third person, without giving the assignment itself, or any facts relating thereto, it was error to decide that the legacy attached was the property of the assignee; the court should have refused judgment, discharged the rule, and ordered the cause to be proceeded in to issue and trial in due course of law.<sup>5</sup>

*Pleadings.*—If the plaintiff is not satisfied with the answers, instead of taking judgment against the garnishee, he obtains a plea and puts the case down for trial. It has been said that when defendant has appeared he must be ruled to plead, and an issue as to him must exist, before the case can be tried.<sup>6</sup> But the reason of this is not clear so far as regards the proceeding against the garnishee, for they may sever in their pleading, and where *nulla bona* is pleaded they cannot be joined, but the jury must be sworn as to the garnishee alone: and even where defendant has pleaded payment, the issue between plaintiff and garnishee may be tried before the issue between plaintiff and defendant is disposed of.<sup>7</sup> Where a debt coming to an executor, who was also residuary legatee, was attached by a private creditor of the executor, it was held that the executor should by pleading to the attachment have put in issue, so as to be tried by a jury, those facts upon which depended the question whether the debt was attachable or not, and that the court below erred in deciding these facts summarily by quashing the attachment.<sup>8</sup>

<sup>1</sup> Bradley v. Bradley, D. C. Phila., 3 Phila. Rep. 414.

<sup>5</sup> Ibid.

<sup>2</sup> Shaffer v. Watkins, 7 W. & S. 220.

<sup>6</sup> Rawling v. Phillips, D. C. Phila., July 1848.

<sup>3</sup> Ibid.

<sup>7</sup> McCormac v. Hancock, 2 Barr

<sup>4</sup> Lancaster Bank v. Gross, 14 Wright 224.

310.

<sup>8</sup> Pleasants v. Cowden, 7 W. & S. 379.

The general issue is *nulla bona*.<sup>1</sup> There is a difference between a plea of *nulla bona*, and an answer denying that the garnishee had any funds in his hands belonging to the defendant, when the attachment issued: assets acquired subsequently to the plea of *nulla bona* cannot be given in evidence on the trial, on account of the rule of pleading which refers every plea to the time where it was made and tests its truth by the facts then existing;—a rule which has no application to the answer, which is a mere discovery of what the garnishee has when he answers, and affords no reason why he should not be compelled to make a further discovery and suffer judgment for the amount discovered: if he wishes to avoid this he should plead *nulla bona*.<sup>2</sup> Hence a debt which did not become payable till after issue joined, though it had vested in interest before the attachment, cannot be enforced against the garnishee: his liability depends upon the state of accounts at the time of plea pleaded, and not on what may occur subsequently.<sup>3</sup>

The plea of *nulla bona* is good for nothing when the plaintiff sets the case down for hearing on the answers.<sup>4</sup>

The garnishee may plead specially almost anything that he can plead against his own original creditor.<sup>5</sup> He may plead that the debt is not presently demandable, in order to qualify the judgment; and with the same object he may plead former attachments so as to make the judgment subject to them: but as the process is rather an execution against the effects of the defendant than an action against the garnishee, he cannot make all the defences which he could if the suit were by his creditor; for the process is valid, even though his creditor may have a suit pending, or a judgment obtained against him for the claim.<sup>6</sup>

In foreign attachment where the plea of the garnishee admits the claim on which his liability is alleged, but offers new and distinct matter to avoid it, the plaintiff should demur or traverse the facts, and may be compelled by rule to reply, but until he does so it is error to nonsuit him for not proceeding to trial.<sup>7</sup>

A plea of set-off, of defendant's bonds held by the garnishee, ought to be as special as a declaration in debt on the bonds, and should specify the very bonds on which recovery is claimed by way of set-off: if it be so defective that it does not describe any particular bonds to be set off, it may be taken advantage of by a general demurrer.<sup>8</sup>

The issue under a sheriff's interpleader was decided in favor of defendant, and the plaintiff subsequently attached the proceeds of the goods in the hands of the defendant as garnishee; the garnishee pleaded the former verdict, the plaintiff replied that the claim there established was under an assignment for the benefit of creditors,

<sup>1</sup> Reed v. Penrose's Executrix, 12 Casey 238, per WOODWARD, J.

<sup>2</sup> Benners v. Buckingham, D. C. Phila., 19 Leg. Int. 292.

<sup>3</sup> Brown v. Brown, D. C. Phila., 3 Phila. Rep. 359; Raiguel v. McConnell, 1 Casey 362.

<sup>4</sup> Fox v. Reed, 3 Grant 81.

<sup>5</sup> Bank v. Little, 8 W. & S. 207.

<sup>6</sup> Kase v. Kase, 10 Casey 128.

<sup>7</sup> Maxwell v. Beltzhoover, 1 Am. L. J. 257.

<sup>8</sup> Fox v. Reed, 3 Grant 81.

and that the thirty days had expired and the assignment was still unrecorded: the replication is good.<sup>1</sup>

If the garnishee admits by his plea certain effects in his hands, it is equivalent to a tender of them to answer the purposes of the process, and the plaintiff may take judgment at any time for the amount admitted to be due.<sup>2</sup>

The *defendant* cannot compel the garnishee to plead; if he prosecutes his claim against the garnishee, and the attachment is pleaded in bar, he can raise any questions which could be raised on the attachment.<sup>3</sup>

*Defences.*—The garnishee is bound to make every just and legal defence which the parties interested in the fund in his hands could make, or he will be answerable to them therefor.<sup>4</sup> He is bound to contest every foot of ground, and if he voluntarily pays the claim of the attaching creditor before judgment against him, he cannot set up his act as a defence in an action for the debt.<sup>5</sup> But the law only requires of him that in good faith he shall see that the money is recovered against him in due course of law, and where there is no fraud or collusion on his part, the judgment against him in the attachment will protect him against his creditor.<sup>6</sup>

Nor can he discharge himself of liability by voluntarily paying the money into court: he has no right to pay it into court, and if it is taken out the garnishee must answer it.<sup>7</sup> But the more recent practice seems to be that a garnishee who has no defence may obtain a rule to pay the money into court and leave the court to adjust conflicting claims to the fund.<sup>8</sup>

He cannot set up in defence matters which only interest the defendant, and do not interest him as garnishee.<sup>9</sup>

Though the judgment on which the attachment issued is fraudulent and void, yet the garnishee cannot impeach it.<sup>10</sup> Nor can he raise the question of its regularity.<sup>11</sup> The recovery against him is not for the amount of the judgment, but for the value of the property in his hands.<sup>12</sup>

As we have seen, an assignment of the claim by his creditor, prior to the attachment, is a good defence. But an unaccepted draft, regarded as an appropriation of the fund, in order to avail against the plaintiff in the attachment, must be shown to have been given to a creditor, and the garnishee must prove this; if he alleges facts amounting to acceptance, he must prove this also.<sup>13</sup>

The judgment-creditors of vendor under articles are entitled to

<sup>1</sup> *Ashton v. Mann*, D. C. Phila., 3 Phila. Rep. 215.

<sup>2</sup> *Newlin v. Scott*, 2 Casey 103.

<sup>3</sup> *Wood v. Miller*, D. C. Phila., 1 Phila. Rep. 226.

<sup>4</sup> *Baldy v. Brady*, 3 Harris 103, per COULTER, J.; *Bank of N. L. v. Munford*, 3 Grant 232.

<sup>5</sup> *Stoner v. Commonwealth*, 4 Harris 387; *Calhoun v. Logan*, 10 Ibid. 47.

<sup>6</sup> *Anderson v. Young's Executors*, 9 Harris 443.

<sup>7</sup> *Baldy v. Brady*, 3 Harris 103;

*Snyder v. Wetherly*, D. C. Phila., 1 Phila. Rep. 325.

<sup>8</sup> See *McBroom's Appeal*, 8 Wright 92.

<sup>9</sup> *Fox v. Reed*, 3 Grant 81.

<sup>10</sup> *Bank of N. L. v. Munford*, 3 Grant 232; *Black v. Nease*, 1 Wright 433. But see *Calhoun v. Logan*, 10 Harris 47.

<sup>11</sup> *O'Connor v. O'Connor*, 2 Grant 245.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ilyatt v. Prentzell*, D. C. Phila., 20 Leg. Int. 133.

the fund arising from a sheriff's sale of the land on a judgment against the vendor, and their liens cannot be affected by a subsequent attachment issued against the unpaid purchase-money in the hands of the vendee.<sup>1</sup>

An order of the Orphans' Court upon a consur in owelty of partition to pay the money into court for distribution, is a good answer to an attachment from another court issued upon a judgment against a recognissee.<sup>2</sup>

In attachment upon a judgment against a partnership, the garnishee cannot plead the pendency of a bill in equity between the partners for the settlement of the accounts.<sup>3</sup>

*Set-off.*—The garnishee has the same rights of set-off and defence against the plaintiff in the attachment that he would have against the defendant if sued by him.<sup>4</sup> Thus he may set off a cross-demand existing in him against the defendant; but the set-off must have been acquired by him prior to the service of the attachment: and the *onus* of showing this is on the garnishee; there is no presumption in the case.<sup>5</sup> A judgment held by an administrator in his own right against a legatee cannot be set off against one who attaches the legacy in the hands of the administrator.<sup>6</sup> But a debt of the legatee to the estate may be set off.<sup>7</sup> The debt of a single member of the firm who are defendants in the attachment cannot be set off by the garnishee on the trial without evidence that the apparently individual contract of such member is the contract of the firm, or has been ratified by the firm.<sup>8</sup> Where the funds of an insolvent canal company were attached in the hands of a banker, who was president of the company, and with whom the treasurer of the company had deposited them, under an agreement to pay interest thereon, and to hold the same subject to call; on the question whether the garnishee could set off bonds of the company owned by him, the court were divided,<sup>9</sup> but afterwards it was decided that he could not.<sup>10</sup>

It is a good defence by the garnishee that he obtained the securities attached, from the defendant, in payment for liabilities previously incurred, and as security for further advances promised, where such further advances had been made, before service of the attachment, to the full value of the securities, or nearly so, although the defendant was insolvent at the time of transferring the securities.<sup>11</sup>

*Trial.*—The act authorizes the joinder of the original defendant, and other persons in the *scire facias*, and they may join or sever in pleading. But under the plea of *nulla bona* the jury should be

<sup>1</sup> *Stewart v. Coder*, 2 Am. L. J. 86; S. 340.

s. c., 1 Jones 90.

<sup>2</sup> *Atkinson v. Hines*, D. C. Phila., 19 Leg. Int. 54.

<sup>3</sup> *Bank of N. L. v. Munford*, S. Ct., 16 Leg. Int. 93.

<sup>4</sup> *Myers v. Baltzel*, 1 Wright 493.

<sup>5</sup> *Pennell v. Grubb*, 1 Harris 552.

<sup>6</sup> *Lorenz's Administrators v. King*, 2 Wright 93.

<sup>7</sup> *Strong's Executor v. Bass*, 11 Casey 333. See *Manifold's Estate*, 5 W. &

<sup>8</sup> *Norcross v. Benton*, 2 Wright 217.

<sup>9</sup> *Reed v. Penrose's Executor*, 12 Casey 214; per *WOODWARD, J.*, he could not; per *STRONG, J.*, he could; and per *LOWRIE, C. J.*, he could not under the plea of *nulla bona*, but should have pleaded specially: *Ibid.*

<sup>10</sup> *Fox v. Reed*, 3 Grant 81.

<sup>11</sup> *Coles v. Sellers*, D. C. Phila., 1 Phila. Rep. 533.

sworn as to the garnishee alone, for it is clear that, under such a state of facts, the proceedings against the garnishee and defendant are distinct and hostile; and though there is a plea of payment by the defendant, the disposal of that issue is not a prerequisite to the trial of that between the plaintiff and garnishee.<sup>1</sup>

Whether the defendant was notified of the attachment is not an issue for a jury.<sup>2</sup>

From the principle that the attaching creditor occupies the position of the debtor, it follows that on trial of the issue the same presumptions of law arise from any particular evidence, as if there had been no attachment, but the action had been brought by the creditor of the garnishee against him. Hence where the answer denied the indebtedness on the part of the garnishee, and the plaintiff proved that the garnishee had been indebted at one time, without showing that such indebtedness continued at the time of the attachment or afterwards, the *onus* is on the garnishee to show payment or a set-off, or judgment will be given against him.<sup>3</sup>

Where the parties go to trial on a plea of former recovery, without a replication, this does not amount to a confession of the truth of the facts stated in the plea.<sup>4</sup>

It is too late on the trial to claim the \$300 exemption.<sup>5</sup>

*Evidence.*—The answers are primary evidence for the garnishee;<sup>6</sup> but the jury are not bound by them when there is anything to disprove or discredit them:<sup>7</sup> and where the garnishee produced no evidence but his own answer, the transaction being in its nature susceptible of the ordinary means of proof, and no reason being assigned to excuse or explain the omission, and the jury found against the garnishee, a new trial was refused.<sup>8</sup>

The plaintiff's *ex parte* affidavit made in the original suit, to which the garnishee was not a party, cannot be read in evidence by the plaintiff.<sup>9</sup>

Where the point in issue was whether a mortgage-debt attached was the separate property of a married woman, or of the defendant her husband, the mortgage being the security for money loaned by the wife in her own name, the declarations of husband and wife, as to advances of money by the wife to the husband several years before, were not admissible.<sup>10</sup>

Evidence is admissible to show that a prior assignment of the legacy or distributive share attached, is fraudulent as to creditors.<sup>11</sup>

On attachment of a note, the payee's admissions, made while he had the note in his possession, that it had been attached, are not to be rejected on the assumption that they were made after the assignment, the witness stating that the note had no assignment on it at that time.<sup>12</sup>

<sup>1</sup> McCormac v. Hancock, 2 Barr 310.

<sup>2</sup> Fox v. Reed, 3 Grant 81.

<sup>3</sup> Fessler v. Ellis, 4 Wright 248.

<sup>4</sup> Tams v. Bullitt *et al.*, 11 Casey 308.

<sup>5</sup> Zimmermann v. Briner, 14 Wright 535.

<sup>6</sup> Erskine v. Sangston, 7 Watts 150.

<sup>7</sup> Adlum v. Yard, 1 Rawle 165.

<sup>8</sup> Mollree v. Guy, D. C. Phila., 1 Phila. Rep. 491.

<sup>9</sup> Black v. Nease, 1 Wright 433.

<sup>10</sup> *Ibid.*

<sup>11</sup> Sinnickson v. Painter, 8 Casey 384.

<sup>12</sup> Anderson v. Young's Executors, 9 Harris 443.



*Witness.*—The defendant is a competent witness for the garnishee.<sup>1</sup> One to whom the attached judgment was assigned for a special purpose, is a competent witness.<sup>2</sup> But where the garnishee had possession of the note, alleging payment, one who appeared on the note as the second and last assignee, is incompetent, on the ground of interest, to prove on the part of the garnishee that the first assignment took place before the attachment and was for value.<sup>3</sup> Where property claimed by the wife is attached for the debt of the husband, he is not a competent witness for the garnishee.<sup>4</sup>

*Verdict.*—Where there is a verdict against the garnishee, the jury find what goods, if any, are in his hands at the time of the attachment executed, and afterwards, and their value.<sup>5</sup> The issue on *nulla bona* is whether the garnishee had effects in his hands or not, and the verdict should respond to it: but if it does not, the court may mould it into shape after it is rendered.<sup>6</sup> Considerable latitude is allowed in this respect, and a court of error will not scrutinize closely the power thus exercised.<sup>7</sup> Where the issue was whether the garnishee had received goods of the defendant in fraud of creditors, and the verdict was against the garnishee for an amount less than the plaintiff's judgment, the presumption is that the jury found a verdict for all the property fraudulently received from the defendant, and that question cannot be retried between the plaintiff and another garnishee, the agent of the first.<sup>8</sup>

*Judgment.*—The judgment, when for plaintiff, is for the value of the goods, &c., found to be in the hands of the garnishee. Judgment may be had against administrators as garnishees of a legacy or distributive share attached, if they have ample funds to pay it after all debts of the estate are discharged.<sup>9</sup> Where the garnishees are administrators, and perhaps in all other cases of trust, it is improper to enter judgment against them *de bonis propriis*,<sup>10</sup> unless there has been misconduct on the part of the garnishee.<sup>11</sup>

The judgment is a qualified one, and the court will restrain any improper use of it.<sup>12</sup> Thus where a debt payable in city bonds is attached in the hands of an individual, the judgment against the garnishee should be —; to be levied out of the bonds of the city of — belonging to the defendant, in the hands of the garnishee, amounting to the sum of —, and in default of the delivery thereof

<sup>1</sup> McCormac v. Hancock, 2 Barr 310; Evans v. Sexton, D. C. Phila., 2 Phila. Rep. 300; Jones v. Bank of N. L., 8 Wright 253.

<sup>2</sup> Fithian v. N. Y. & E. R. R. Co., 7 Casey 114.

<sup>3</sup> Anderson v. Young's Executors, 9 Harris 443.

<sup>4</sup> Gross v. Reddig, 9 Wright 406.

<sup>5</sup> Foreign Attachment Law, § 58, Purd. Dig. 494, pl. 19.

<sup>6</sup> Flanagan v. Wetherill, 5 Whart. 286.

<sup>7</sup> Keen v. Hopkins, 12 Wright 445.

<sup>8</sup> Tams v. Richards, 2 Casey 97.

<sup>9</sup> Lorenz's Administrators v. King, 2 Wright 93.

<sup>10</sup> Lorenz's Administrators v. King, 2 Wright 93, qualifying Layman v. Beam, 6 Whart. 186.

<sup>11</sup> Act 13th June 1836, § 57, Purd. Dig. 494, pl. 18; Corbyn v. Bollman, 4 W. & S. 342; Frederick v. Easton, 4 Wright 419.

<sup>12</sup> Kase v. Kase, 10 Casey 128.

to the sheriff on the presentation of the execution for the sale thereof, then to be levied of the proper goods, chattels, and effects of the said garnishee, &c.<sup>1</sup> And in such case the value of the bonds may be ascertained by a jury on an issue raised for that purpose; or the bonds may, for the purposes of remedy, be treated as stocks and be required to be sold for the payment of the plaintiff's judgment, just as stocks are sold in such a proceeding.<sup>2</sup> And in foreign attachment where the garnishees, a railroad company, admitted in their answers a much larger indebtedness, payable in their bonds, than the plaintiff's demand; and afterwards paid the defendant in bonds, retaining enough of them *if taken at par* to pay the plaintiff's claim, which facts were set out in amended answers; it was error to enter judgment on the answers for the amount of the claim at the time of the attachment, excluding the interest accrued, payable in the bonds of the company at par: as the company had admitted enough in their hands to pay the claim of the plaintiff, which they did not retain, judgment should have been rendered against them as garnishees, *de bonis propriis*, for the full amount of the claim with interest and costs.<sup>3</sup>

Where defendant dies pending the attachment, it is not necessary to revive the proceeding by *scire facias* against his personal representatives, before judgment can be finally entered against the garnishees; though if they have equitable ground they will be let in to take defence.<sup>4</sup>

*Effect of judgment.*—A verdict and judgment in favor of garnishee is not a bar to an attachment by another creditor against the same person as garnishee of the same defendant.<sup>5</sup> And such judgment cannot be pleaded in estoppel, in trespass on the case for conspiracy against the garnishee, for conspiring with the defendant in the attachment to defraud his creditors by secreting his property.<sup>6</sup> Such judgment binds only the attaching creditor.<sup>7</sup> It is conclusive of nothing more than that the garnishee had not at the time goods of the defendant in his hands.<sup>8</sup>

And a judgment against the garnishee is not conclusive in a subsequent action against him by the insolvent trustees of the defendant in the attachment, in which fraud is alleged in regard to the transfer by the defendant to the garnishee: though the defendant would be concluded by such judgment his assignees are not: their rights are superior to his; they claim not through his fraudulent arrangements but superior to them.<sup>9</sup> A judgment on the plea or answer for the amount admitted to be due by the garnishee is a judgment *quasi in rem* against the effects in his hands.<sup>10</sup>

And under our statute foreign attachment is not strictly a proceeding *in rem*, and therefore the final judgment in the attachment,

<sup>1</sup> King v. Hyatt, 5 Wright 229.

<sup>2</sup> Ibid., per LOWRIE, C. J.

<sup>3</sup> Frederick v. Easton, 4 Wright 419.

<sup>4</sup> Etting v. Moses, D. C. Phila., 1 Phila. 399.

<sup>5</sup> Breeding v. Seigworth, 5 Casey

396; Tams v. Lewis, 6 Wright 402.

<sup>6</sup> Ibid.

<sup>7</sup> Tams v. Bullitt, 11 Casey 308.

<sup>8</sup> Tams v. Lewis, 6 Wright 402.

<sup>9</sup> Tams v. Bullitt, 11 Casey 314.

<sup>10</sup> Newlin v. Scott, 2 Casey 103.

though conclusive as to parties and privies, did not conclude all the world as to the defendant's ownership of the chattels.<sup>1</sup>

The judgment in the attachment is a good defence to an action against the garnishee by the defendant in the attachment, or by one claiming as assignee of the thing attached, provided the garnishee acted in good faith, and without fraud or collusion, in reference to the proceedings in the attachment.<sup>2</sup> But where a person is member of two firms, and a debt due one firm was attached by creditors of the other, the garnishee debtor cannot set up the judgment in the attachment as a defence in an action against him by the firm to whom the debt was due; the attachment in such case embraced only the individual interest of the common partner of the two firms in the assets of the creditor firm.<sup>3</sup> An attachment-execution, prosecuted to judgment against the garnishee, is not satisfaction of the debt, either in favor of the debtor or of a junior encumbrancer.<sup>4</sup>

Judgment against the defendant establishes no more than the existence of the debt claimed by the plaintiff in the attachment.<sup>5</sup>

*Appeal.*—An appeal lies as in other cases. An assignee for the benefit of creditors, though not a party to the record, may appeal from the judgment of a justice of the peace against garnishee in attachment-execution against the assignor.<sup>6</sup>

*Costs.*—A garnishee without fault is entitled to his costs.<sup>7</sup> So where he has filed his answers, and the plaintiff is not satisfied, but compels him to plead and prepare for trial, and then suffers a nonsuit.<sup>8</sup> So, if the verdict should find no more assets in the hands of the garnishee than he admitted by his answers or plea, the garnishee is entitled to costs.<sup>9</sup> And in the latter case, as also where the plaintiff takes judgment on the plea or answer without going to trial, the garnishee is to be allowed, out of the assets in his hands, a reasonable counsel fee, to be taxed in cases of dispute by the court, or a person appointed by it for the purpose.<sup>10</sup> And executors or administrators, or trustees of decedents' estates, made garnishees in attachment-execution, are entitled to reasonable costs and expenses.<sup>11</sup> The garnishee, upon judgment in his favor, is not entitled to the costs of an exemplification of an assignment, which was produced by him on the trial to prove his case.<sup>12</sup> Where there are two attachments against different garnishees, and one obtains a verdict, he cannot claim costs out of funds found to be in the hands of the other.<sup>13</sup>

The plaintiff will be entitled to his costs if the verdict should find more assets in the hands of the garnishee than were admitted by his plea or answers.<sup>14</sup> If the garnishee suffers judgment to go

<sup>1</sup> *Megee v. Beirne*, 3 Wright 50.

<sup>2</sup> *Anderson v. Young's Executors*, 2 Harris 443.

<sup>3</sup> *Lucas v. Laws*, 3 Casey 211.

<sup>4</sup> *Baldwin's Estate*, 4 Barr 248; *Campbell's Appeal*, 8 Casey 88.

<sup>5</sup> *Bank v. Little*, 8 W. & S. 207.

<sup>6</sup> *Bletz v. Haldeman*, 2 Casey 403.

<sup>7</sup> *Irwin v. P. & C. R. R. Co.*, 7 Wright 490.

<sup>8</sup> *Hall v. Knapp*, 1 Barr 213.

<sup>9</sup> *Hall v. Knapp*, 1 Barr 213; *Newlin*

*v. Scott*, 2 Casey 103.

<sup>10</sup> Act of 22d April 1863, § 1, *Bright. Supp.* 1295, pl. 1, *Pamph. Laws* 527.

<sup>11</sup> Act 10th April 1849, § 11, *Purd. Dig.* 436, pl. 36, *Pamph. L.* 620.

<sup>12</sup> *Christmas v. Biddle*, D. C., Phila., 1 Phila. 68.

<sup>13</sup> *Foyle v. Foyle*, D. C. Phila., 1 Phila. 182.

<sup>14</sup> *Hall v. Knapp*, 1 Barr 213; *Newlin v. Scott*, 2 Casey 103.

against him he is not liable for costs; but it is otherwise if he pleads a false plea, or if he falsely denies that there are effects in his hands.<sup>1</sup> But after in his answers admitting a certain amount due, and claiming to be allowed his expenses in the case out of the same, he may, if ruled to plead, plead *nulla bona*, without thereby rendering himself liable for costs.<sup>2</sup>

*Modes of obtaining satisfaction* vary with the nature of the thing attached. But satisfaction, as in other cases, is effected only by actual payment, or by a levy on goods sufficient to pay the debt.<sup>3</sup> Execution against the garnishee is subject to the same rules as in foreign attachment;<sup>4</sup> and after verdict for plaintiff, he may have execution to be levied of the goods, &c., found in the hands of the garnishee, and also execution against the garnishee as of his proper debt, if he neglect to produce the goods or pay the debt.<sup>5</sup> Where it appears that the garnishees hold goods, pawned or pledged to them by the defendant, the court, on judgment being taken against them, will award a *fi. fa.* to sell all the right, title, and interest of the defendant in the specific goods.<sup>6</sup>

When a debt in suit is attached, the plaintiff, after obtaining judgment in the attachment, may prosecute the suit to execution by marking the action to his use.<sup>7</sup>

Where a judgment is attached proceedings thereon will be stayed.<sup>8</sup>

The plaintiff in the attachment is entitled to the benefit of the

<sup>1</sup> Foyle v. Foyle, D. C. Phila., 1 Phila. 182.

<sup>2</sup> See Newlin v. Scott, 2 Casey 103.

<sup>3</sup> Baldwin's Estate, 4 Barr 248. See Fox v. Foster, *Ibid.* 119.

<sup>4</sup> Act 16th June 1836, § 38, *Purd. Dig.* 435, pl. 34, *Pumph. L.* 768. See *post*, Vol. II., "Foreign Attachment."

<sup>5</sup> Act 13th June 1836, §§ 59, 60, *Purd. Dig.* 494, pl. 20, 21, *Pamph. L.* 583.

<sup>6</sup> Lamb v. Vansciver, D. C. Phila., December 22d 1849. Rule for judgment against garnishees. *Per curiam*. It appears by the answers of the garnishees, that they hold certain articles of personal property belonging to defendants as a pawn, pledge, or security for debts, advances, or liabilities. The Act of Assembly of 16th June 1836, relating to executions, is not very clear in its provisions in regard to goods pawned or pledged. The 23d section provides, that "goods or chattels of the defendant in any writ of *fi. facias*, which shall have been pawned or pledged by him as security for any debt or liability, or which have been demised, or in any manner delivered or bailed for a term, shall be liable to sale upon execution as aforesaid, subject, nevertheless, to all and singular the rights and

interests of the pawnee, bailee, or lessee, to the possession or otherwise, of such chattels or goods, by reason of such pledge, demise, or bailment." The 35th section, however, extends the attachment-execution to "goods or chattels pawned, pledged, or demised, as aforesaid;" but in the 38th section, which sets out with professing to give the proper execution in all cases of judgment against the garnishees in the process of attachment-execution, no notice whatever is taken of the case of goods pawned, pledged, or demised. It appears to us, however, that we must construe the whole act together, so as to give effect to all its parts, and, therefore, that whenever it appears upon the answers of the garnishees filed, that they have in their possession goods or chattels, pledged, &c., we must award a writ of *fi. fa.*, under the 23d section, to sell all the right, title, and interest of the defendants in the specific goods.

Judgment against defendant for the amount admitted, and *fi. fa.* awarded as to the balance, against the goods admitted to be held by both garnishees.

<sup>7</sup> Sweeny v. Allen, 1 Barr 380.

<sup>8</sup> Paxson v. Sanderson, D. C. Phila., 8 Leg. Int. 54; Daly v. Derringer, 9 *Ibid.* 46.

attached judgment, on distribution of the proceeds of a sheriff's sale of the garnishee's real estate.<sup>1</sup>

An assignment of a debt, whether by attachment or otherwise, carries with it the right to use all the securities, incidents, or guaranties of the debt.<sup>2</sup>

Where a legacy or distributive share has been attached in the hands of the executor or administrator, the plaintiff, before receiving the legacy or distributive share, or such part thereof as he may be entitled to, must tender to the garnishee a refunding bond, in double the amount, to be received from him, with sufficient security to be approved by the court, conditioned that if any debt or demand shall be afterwards recovered against the estate of the decedent, or otherwise be duly made to appear, he will refund the rateable part of such debt or demand, with the costs of recovery.<sup>3</sup> The form of this bond may be found in Smith.<sup>4</sup>

Where land was devised to executors in trust to sell and to divide the proceeds among legatees, attaching creditors of the interest of a legatee may compel the executors to sell by proceedings in equity.<sup>5</sup>

The garnishee in attachment-execution is not entitled to a stay of execution upon entering security.<sup>6</sup>

*Execution against stock.*—In proceeding against stock belonging to the defendant in the execution, it may happen that either: 1. the stock is held in the name of the defendant; or, 2. the stock, though belonging to the defendant, is held in the name of another person. The mode of proceeding differs in the two cases.

1. *Stock held in the name of the defendant.*—The Act of 29th March 1819, § 2,<sup>7</sup> provides that the stock of any body corporate, owned by the defendant in his own name, shall be liable to be taken in execution and sold in the same manner that goods and chattels are liable in law to be so taken and sold, subject, nevertheless, to any debt due by the holder to the company. This section is still in force;<sup>8</sup> but it only applies to stock held in the name of the real owner.<sup>9</sup> Hence, if the defendant has sold, but not transferred the stock, it cannot be taken in execution, but the creditor must resort to his attachment; the rule which obliges exclusive possession of chattels to be taken by the buyer to secure them against executions against the vendor, does not apply to transfers of stock.<sup>10</sup>

A subsequent sale of bank stock, under the lien of the bank for a debt due by the owner, divests the title of the purchaser at the former sale under execution against the owner.<sup>11</sup> The lien of the

<sup>1</sup> Baldwin's Estate, 4 Barr 248.

<sup>2</sup> Ibid. See Fox v. Foster, Ibid. 119.

<sup>3</sup> Act 13th April 1843, § 10, Purd. Dig. 435, pl. 35, Pamph. L. 235; referring to Act 27th July 1842, § 2, Purd. Dig. 492, pl. 7, Pamph. L. 436; which again refers to Act 24th February 1834, § 41, Purd. Dig. 302, pl. 178, Pamph. L. 80.

<sup>4</sup> Smith's Forms 371, pl. 15.

<sup>5</sup> Selfridge's Appeal, 9 W. & S. 55.

<sup>6</sup> Woolston v. Adler, D. C. Phila., 1 Phila. Rep. 284.

<sup>7</sup> Purd. Dig. 436, pl. 38; 7 Sm. Laws 217.

<sup>8</sup> Lex v. Potters, 4 Harris 295.

<sup>9</sup> Ibid.

<sup>10</sup> Commonwealth v. Watmough, 6 Whart. 138.

<sup>11</sup> West Branch Bank v. Armstrong, 4 Wright 278.

bank upon stock attaches upon the protest of a note drawn or endorsed by the owner of the stock.<sup>1</sup>

In case of a sale of stock under a *fi. fa.* the sheriff is not bound to transfer it on the books of the company; the record is sufficient evidence of the title of his vendee.<sup>2</sup>

The Act of 1836<sup>3</sup> provides another mode of proceeding against stock held in defendant's name, which is to some extent concurrent with that given by the Act of 1819, so that the execution may be either by *fi. fa.*, under the Act of 1819, or by attachment, under the Act of 1836, at plaintiff's election.<sup>4</sup> The latter mode, however, is exclusively to be used when the defendant is not the real owner of the stock held in his name, though he may have an interest therein, and it is therefore the preferable mode of proceeding in all cases where his ownership is doubtful. And it is preferable where the stock held in defendant's name is subject to a charge of lien upon the title.<sup>5</sup> In this proceeding the prothonotary, upon application, issues process in the nature of an attachment against such stock held in the name of defendant.<sup>6</sup> In the case of *Lex v. Potters*,<sup>7</sup> there was a clause of *scire facias* directed to the corporation, and this would seem to be the proper form, though not expressly required by the act.

If any person claims to be the owner of the stock, he is to be admitted to become a party to the record and take defence as if he had been made garnishee in the writ, upon his filing an affidavit that the stock is really his property, and entering into a recognisance with two sufficient securities, conditioned for the payment of such damages as may be adjudged to the plaintiff if the stock is found to belong to the defendant.<sup>8</sup> The subsequent proceedings to judgment are the same as in attachment-execution; the execution is the same as under the mode of proceeding next described.

2. *Where stock belonging to defendant is held in the name of another.*—By the 32d section of the Act of 1836,<sup>9</sup> the plaintiff must file in the office of the prothonotary an affidavit, stating that he verily believes such stock to be really the property of the defendant, and must enter into a recognisance with two sufficient sureties, conditioned for the payment of such damages as the court may adjudge, to the party to whom the stock really belongs, in case it should not be the property of the defendant. Upon the filing of such affidavit and recognisance, the prothonotary may issue an attachment-execution in the usual form against the stock, with a clause of summons, to the person in whose name it is held as gar-

<sup>1</sup> *West Branch Bank v. Armstrong*, 4 road Co., 14 Wright 314.  
Wright 278.

<sup>2</sup> *Sewall v. Lancaster Bank*, 17 S. & R. 285.

<sup>3</sup> Sect. 34, *Purd. Dig.* 434, pl. 29, Pamph. L. 767.

<sup>4</sup> *Bonaillon v. Wyoming Canal Co.*, D. C. Phila., 4 Phila. Rep. 29; *Weaver v. Huntingdon, &c., Railroad Co.*, 14 Wright 314.

<sup>5</sup> *Weaver v. Huntingdon, &c., Rail-*

<sup>6</sup> See Form of *Præcipe*, Smith's Forms 367, pl. 10.

<sup>7</sup> 4 Harris 295.

<sup>8</sup> Act 16th June 1836, § 34. See Form of Claim, Affidavit, and Recognisance, Smith's Forms 368, pl. 11; and of the Order to admit Claimant to become a party, *Ibid.* 369, pl. 12.

<sup>9</sup> *Purd. Dig.* 434, pl. 27, Pamph. L. 767.

nishee.<sup>1</sup> The proceeding must be brought in the county where the garnishee resides.<sup>2</sup> The effect of the attachment is to bind the stock from the time of service, as has been already explained under attachment-execution. The proceedings from the service to the judgment against the garnishee do not differ from the regular proceedings in attachment-execution. The execution must be by *fi. facias* against the original defendant, under which the stock, or so much as may be necessary, may be sold by the sheriff as in other cases.<sup>3</sup>

The 3d section of the Act of 29th March 1819,<sup>4</sup> provides a mode of proceeding against stock of defendant, not held in his own name, which is substantially the same as that provided by the Act of 1836, except that the earlier act allows the proceeding to be commenced before judgment, and even before suit brought, expressly extends to suits before aldermen and justices of the peace, and in such suits allows appeals to be taken in the ordinary mode when the amount in controversy exceeds five dollars and thirty-three cents. This section is believed to be still in force so far as not supplied by the Act of 1836.

#### SECTION IV.

##### EXECUTION AGAINST REAL ESTATE.—FIERI FACIAS.

When sufficient personal property cannot be found by the officer on the writs just mentioned, the defendant's lands, tenements, and hereditaments, which with certain modifications are considered in this State as chattels for the payment of debts,<sup>5</sup> are by the Act of 16th June 1836,<sup>6</sup> liable to be seized and sold upon judgment and execution. It is necessary to exhaust such personal property as can be reached by *fi. fa.* before proceeding against the land.<sup>7</sup> But after a *fi. fa.* has been executed against land, the court will not set it aside on the ground that since the inquisition sufficient personal property has been found to satisfy the execution.<sup>8</sup>

The character and extent of the interests in land which are subject to levy and sale have been already shown.<sup>9</sup> Though land which has been acquired by the defendant since the judgment is not subject to the lien of the judgment, it is just as much subject to seizure and sale in execution as any other property of defendant.<sup>10</sup> If land bound by the judgment has since been aliened, the plaintiff may proceed against it in the hands of the *terre-tenant* without resorting to a *scire facias*.<sup>11</sup>

<sup>1</sup> Act of 1836, § 33, Purd. Dig. 434. See Forms of Præcipe, Affidavit, and Recognisance, Smith's Forms 366, pl. 9.

<sup>2</sup> Cowden v. West Branch Bank, 7 W. & S. 432.

<sup>3</sup> Act 16th June 1836, § 38, Purd. Dig. 435, pl. 34, Pamph. L. 768.

<sup>4</sup> Purd. Dig. 436, pl. 39, 7 Sm. 217.

<sup>5</sup> Andrews's Lessee v. Fleming, 2 Dallas 94, Cowden v. Brady, 8 S. & R.

508; Himes v. Jacobs, 1 Pa. R. 158.

<sup>6</sup> Sect. 43, Purd. Dig. 439, pl. 50, Pamph. L. 769.

<sup>7</sup> See ante, 782-3.

<sup>8</sup> Hunt v. McClure, 2 Yeates 387.

<sup>9</sup> Ante, 800 et seq.

<sup>10</sup> Packer's Appeal, 6 Barr 277; Lea v. Hopkins, 7 Barr 492.

<sup>11</sup> Young v. Taylor, 2 Binn. 228.

Where the judgment is on the bond accompanying a mortgage the *fi. fa.* is not restricted to the mortgaged premises.<sup>1</sup>

The writ generally used to enforce judgment against land is the *fieri facias*. The proceedings under this writ in their regular order will be explained in the present section, reserving certain special cases to be treated separately hereafter.

*Nature and form of the writ.*—The object to be effected by the writ is the seizure and sale of the defendant's interest in the land, and the application of the proceeds to the payment of the judgment. But in order that defendants may not be at the mercy of their creditors, an inquisition must be held to ascertain if from the profits of the land the debt, interest, and costs may be satisfied in seven years, in which event the land is not sold at all, but appraised and either taken by the plaintiff at the valuation to hold until his judgment, with interest and costs, has been paid, or delivered to the defendant to keep, on his paying the plaintiff the appraised value in semi-annual payments until his debt is satisfied. If, however, there is a written waiver of an inquisition by the defendant, the sheriff may proceed to sell the real estate on the *fi. fa.* before the return day without any further writ,<sup>2</sup> and this is also the proceeding where, from the peculiar nature of the estate levied on, an inquisition is unnecessary. If the inquest condemn the land, that is, find that it will not pay the debt, interest, and costs, in seven years, the sheriff returns this fact along with his *fi. fa.*, and thereupon the plaintiff may have a writ of *venditioni exponas* to sell the land, and pay his debt from the proceeds.

*Form.*—The form of the writ is not prescribed by the act: it is a mandate from the court to the sheriff, or other proper officer, commanding him that of the lands (or goods and lands) of the defendant he *cause to be made* the amount specified, and that he have the same, together with the writ, in court at the return day.

*Levy.*—The first step towards the execution of this writ is the levy, to constitute which no actual entry upon or seizure of the lands and tenements need be made by the sheriff, who does not in the case of land, as he does in the case of chattels, take the thing levied out of the defendant's possession.<sup>3</sup> The act is silent as to the manner of its performance; and gives no directions as to notice to the defendant. The levy on real estate is made on paper, the defendant is not entitled to any notice of it, and it may be entered after the return day, even if a former levy had been set aside.<sup>4</sup> But the defendant must have notice either of the levy or of the inquisition.<sup>5</sup> The levy is to be made on the real estate of the defendant or such part thereof as the officer may deem sufficient to pay the sum to be levied, but not less than a whole tract can be levied.<sup>6</sup>

The plaintiff should furnish to the sheriff a description of the

<sup>1</sup> *Morris's Executors v. McConaughy's Executors*, 1 Yeates 9, 12.

<sup>2</sup> Act 16th June 1836, § 45, *Purd.* Dig. 439, pl. 52, *Pamph. L.* 769.

<sup>3</sup> *Cowden v. Brady*, 8 S. & R. 509.

<sup>4</sup> *Hurst v. Rodney*, *Bald. R.* 270. See

*Heydrick v. Eaton*, 2 Binn. 217; *Thompson v. Phillips*, 2 W. C. C. R. 49.

<sup>5</sup> *Heydrick v. Eaton*, 2 Binn. 217.

<sup>6</sup> Act 16th June 1836, § 43, *Purd.* Dig. 439, pl. 50, *Pamph. L.* 769.



property by metes and bounds, as set forth in the defendant's title-papers on record.

The sheriff annexes to his return a description of the nature of the interest levied on, and of the situation and boundaries of the land. This identifies and fixes the object levied on, and is the only mode of ascertaining what was taken in execution. In a case of variance between the levy and subsequent proceedings the levy must govern.<sup>1</sup> Generally the levy controls all subsequent proceedings, as where a levy was made on a rent-charge, and by mistake the sheriff advertised the lot on which it was charged, and executed a deed conveying the lot, and no application was made in time to set aside the sale, the *rent-charge* was held to pass to the purchaser.<sup>2</sup> And a mistake in the levy as to the character of the defendant's estate is fatal: thus a levy and sale of the defendant's estate as a tenancy by the curtesy, when he had the fee, passes no title.<sup>3</sup> But a mere vagueness in the description of defendant's interest in the land is not a fatal objection to the levy, but may be amended.<sup>4</sup> So a levy on the undivided moiety when defendant owns the whole will be set aside on his application.<sup>5</sup>

But a mistake in respect to the quantity and boundaries of the land is not so serious. A description by metes and bounds and the rents described as issuing out of the land, is sufficient.<sup>6</sup> More laxity of description is allowed in levies than in deeds, because the title-papers are not always accessible to the plaintiff. But a levy and sale is a mere nullity which affects to pass all defendant's property in general terms, as all his lands in Pennsylvania.<sup>7</sup> It is enough if the levy shows what was intended to be levied on; and where doubtful expressions are used, the construction should be favorable to the recovery of the debt by the plaintiff.<sup>8</sup> Thus a levy on a tract of land generally, embraces whatever interest the defendant had in it, unless there were something else in the levy restricting it to a particular part or share of the land.<sup>9</sup> So if the levy and sale are not by fixed boundaries, or of any ascertained quantity, but of a certain number of acres, more or less, in the tenure of the defendant, the vendee holds by the extent of such tenure.<sup>10</sup> The levy ought not to be construed beyond the natural meaning of its words where there is nothing else to explain them: the description of real estate in a levy is usually furnished by the plaintiff, who may

<sup>1</sup> Grubb v. Guilford, 4 Watts 244, ROGERS, J.

<sup>2</sup> Stresper v. Fisher, 1 Rawle 155, 162.

<sup>3</sup> McLaughlin v. Shields, 2 Jones 283. And mere acquiescence in the mistake by the defendant will not conclude him: to have that effect the mistake must be brought about by the action of the defendant: Ibid.

<sup>4</sup> Donaldson v. Bank of Danville, 8 Harris 245. On a rule to show cause why the levy, inquisition, *ren. ex.*, and sheriff's sale should not be set aside, the court set aside the sale but refused

to set aside the inquisition, and granted leave to amend the levy; and the Supreme Court held that such matters must be left to the sound discretion of the court below, and are not matters of error. The writ of error was quashed: Ibid.

<sup>5</sup> McCormick v. Harvey, 9 Watts 484.

<sup>6</sup> Heartley v. Beaum, 2 Barr 171.

<sup>7</sup> Ibid.

<sup>8</sup> Inman v. Kutz, 10 Watts 100.

<sup>9</sup> Ibid.

<sup>10</sup> Hyskill v. Givin, 7 S. & R. 369; Swartz v. Moore, 5 Ibid. 257; Zeigler v. Houtz, 1 W. & S. 533.

embrace in it whatever he chooses; and if he use limited and restrained language, the purchaser claiming under the plaintiff's levy and sale must take according to the description; thus if the levy be on half of a tract, he takes no more at the sale, although the defendant may then be owner of the whole.<sup>1</sup> A levy free from ambiguity, fraud, or misrepresentation cannot be impeached or contradicted by parol evidence.<sup>2</sup> And a clear mistake in the situation of the land is fatal; thus a sale under a mechanic's claim against a house on A. street will not pass a house on B. street, and parol evidence is inadmissible to show that the description was intended to apply to the house sold.<sup>3</sup> In such case also the sale will be set aside; and perhaps the purchaser might defend on this ground in an action against him by the sheriff for the purchase-money.<sup>4</sup>

The sheriff is not bound to levy on all the defendant's lands in his bailiwick: neither can he cut up and divide particular tracts, a levy upon a part of a tract being illegal and prohibited by the act; nor can an administrator agree to such a levy.<sup>5</sup> But he is bound to follow the directions of the plaintiff as to seizing on a specific tract, and this is constantly done.<sup>6</sup> So, if there be a general judgment affecting different estates, or distinct tracts, the judgment-creditor may direct a levy to be made on one only; although if the estate levied on has been sold or conveyed by the defendant subsequently to the judgment, and the remaining lands are sufficient to satisfy all the liens, the court will interfere.<sup>7</sup>

It is not a valid ground for setting aside a levy that the land is named as several parcels when it ought to be sold together; or as one tract when it ought to be sold separately; or that the description of the defendant's interest in the land is vague. The levy may be amended with leave of the court, which has a controlling power over the sale.<sup>8</sup>

A party is not restricted in his levy to premises which have been mortgaged, where suit has been brought upon a bond which accompanies the mortgage. But if there be any dispute as to the distribution of the proceeds, the court will decide how the money shall be disposed of, when it is paid into court.<sup>9</sup>

Where a small piece of land is purchased by the owner of a tract adjoining it for the purpose of uniting it therewith, and of using, improving, and occupying the whole as one tract and it is so used and occupied, it becomes united to the larger tract; and it is sufficient, in order to include both in a levy, for the sheriff to describe them generally as one tract, without any particular description of the lesser tract, or specification of the title under which it is held.<sup>10</sup>

<sup>1</sup> *McCormick v. Harvey*, 9 Watts 482; *Carpenter v. Cameron*, 7 *Ibid.* 51. See *McLaughlin v. Shields*, 2 Jones 287.

<sup>2</sup> *McClenahan v. Humes*, 1 *Casey* 85.

<sup>3</sup> *Simpson v. Murray*, 2 *Barr* 76.

<sup>4</sup> *Friedly v. Scheetz*, 9 S. & R. 156.

<sup>5</sup> *Snyder v. Castor*, 4 *Yeates* 443; s. c., 2 *Binn.* 216, in note; *Maybury v. Jones*, 4 *Yeates* 21.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Mevey's Appeal*, 4 *Barr* 80; *Cowden's Estate*, 1 *Ibid.* 279; *Nailer v. Stanley*, 10 S. & R. 450; and see *ante*, 808.

<sup>8</sup> *Donaldson v. Bank of Danville*, 8 *Harris* 245.

<sup>9</sup> *Morris's Executors v. McCaughey's Executors*, 1 *Yeates* 9, 12.

<sup>10</sup> *Buckholder v. Sigler*, 7 W. & S. 154.

And where the second lot was held by adverse possession, having been the site of a mill-pond appurtenant to a mill on the tract held in fee, but that right having ceased, under the provisions of the grant, by disuser, a sheriff's sale of the defendant's title to the tract owned in fee, with the appurtenances, passes his title in the second lot.<sup>1</sup>

*Setting aside levy.*—The remedy for a defective or erroneous description in the levy, is by application to the court to set it aside. This should be made at an early moment, if possible, before the sale, and must be made before the sheriff's deed is acknowledged.<sup>2</sup> If the defendant lie by and allow the purchaser to pay his money and receive a deed, he has no cause of complaint.<sup>3</sup> The court may permit the levy to be amended instead of setting it aside. The grounds upon which a levy will be set aside have been already explained in considering the manner of making the levy. The refusal to set aside a levy is within the sound discretion of the court below, and is not matter of error.<sup>4</sup>

When the levy is set aside, the plaintiff cannot proceed to sell without a fresh levy, and a sale made under a *venditioni exponas*, issued without such fresh levy, would be void.<sup>5</sup>

*Effect of levy.*—By the principles of the common law, a lien is a necessary and inseparable incident of seizure in execution.<sup>6</sup> And though an execution levied on land will not operate to continue the lien of the judgment, yet it would create a new lien so as to protect, for a reasonable time, the property levied on.<sup>7</sup> And after a levy on land in the possession of the debtor, he cannot, with a view to defeat the creditor, transfer the possession even to the real owner: the owner in such case must pursue his title by ejectment.<sup>8</sup>

A *fi. fa.* levied on land is not notice to a *terre-tenant*.<sup>9</sup>

*Abandonment of proceedings.*—Where the defendant disclaimed all title to the land levied on, and the plaintiff thereupon abandoned further proceedings on the *fi. fa.*, and issued an *alias fi. fa.*, the court refused to set aside the latter writ at the instance of the defendant, who based his application on the ground that the plaintiff was bound to pursue his levy on the first writ to condemnation.<sup>10</sup>

And where the land is found by the inquest sufficient to pay by its profits the debt in seven years, the plaintiff it seems is not bound to proceed to extend the land, but may bide his time, and come upon the proceeds of that or any other tract when sold upon any other execution.<sup>11</sup>

<sup>1</sup> Scheetz v. Fitzwater, 5 Barr 126.

<sup>2</sup> Buchanan v. Moore, 13 S. & R. 304; Carpenter v. Cameron, 7 Watts 60, per Huston, J.; McCormick v. Harvey, 9 Watts 485.

<sup>3</sup> Heartley v. Beaum, 2 Barr 165, SERGEANT, J.

<sup>4</sup> Donaldson v. Bank of Danville, 8 Harris 247.

<sup>5</sup> Burd v. Lessee of Dansdale, 2 Binn. 80.

<sup>6</sup> Stauffer v. Commissioners, 1 Watts

300; Shaeffer v. Child, 7 Ibid. 86; Packer's Appeal, 6 Barr 277; Hinds v. Scott, 1 Jones 25.

<sup>7</sup> Stauffer v. Commissioners, 1 Watts 300.

<sup>8</sup> Stahle v. Spohn, 8 S. & R. 317.

<sup>9</sup> Koons v. Hartman, 7 Watts 20.

<sup>10</sup> Coleman v. Mansfield, 1 Miles 56. See Hunt v. Breeding, 12 S. & R. 37; Morrison's Appeal, 1 Barr 13.

<sup>11</sup> Taylor's Appeal, 1 Barr 390.

And where the plaintiff, having two judgments, issued a *fi. fa.* upon the oldest, and levied upon defendant's land which was extended, though the *liberari* was not executed, it was held that this proceeding did not preclude him from having an execution upon the second judgment, although both judgments were laid before the inquest upon the first judgment.<sup>1</sup> If the land were retained by defendant, this would now fall within the prohibition of the Act 26th April 1855, § 1.<sup>2</sup>

*Inquisition.*—The next step to be taken by the sheriff after levying on real estate, is to summon an inquest for the purpose of ascertaining whether the rents and profits of such estate, beyond all reprises, will be sufficient to satisfy within seven years, the judgment upon which the execution was issued, with the interest and costs of suit.<sup>3</sup>

*When necessary.*—Generally a sale of improved land without inquisition is void.<sup>4</sup> It is requisite in order to authorize the sale of the equitable title of a vendee under articles of agreement; although levied on as an estate for life, and although the vendor had disseised or obtained possession from the vendee.<sup>5</sup> And the want of an inquisition is not cured by showing that the land was held adversely to the title of the defendant.<sup>6</sup> And a local Act of Assembly<sup>7</sup> providing that there shall be no stay of execution, or other stay on judgments, on constables' bonds in Venango, for non-payment to the county treasurer of taxes collected, does not dispense with the inquisition.<sup>8</sup>

But the want of an inquisition can be taken advantage of only by the defendant in the execution, and by him only within a reasonable time.<sup>9</sup> And therefore the voluntary abandonment of the land by the defendant after the sale, the entry by the purchaser from the sheriff's vendee, and his retention of possession for twenty years or more, will defeat a mere intruder who defends his possession under the title alleged to exist in the defendant in the execution, on the ground of the defect in the sheriff's sale by reason of the want of an inquisition.<sup>10</sup>

*Dispensed with in some cases.*—If the property consist of a vacant lot in a town, or of mere woodlands unimproved, an inquest is unnecessary;<sup>11</sup> and where it was evident that the debt and costs could not be satisfied within seven years out of the annual rents and profits, the want of an inquisition did not vitiate the sale.<sup>12</sup> And if the land has been previously condemned under a *fi. fa.*, another judgment-creditor may sell without a new inquisition.<sup>13</sup>

So an inquisition is unnecessary where the estate levied on is of

<sup>1</sup> *Gist v. Wilson*, 2 Watts 30.

<sup>2</sup> *Purd. Dig.* 442, pl. 70, Pamph. L. 313. See *post*, 989, "Retention of the Lands by the Defendant, &c."

<sup>3</sup> Act 16th June 1836, § 44, *Purd. Dig.* 439, pl. 51, Pamph. L. 769.

<sup>4</sup> *Wray v. Miller*, 8 Harris 111.

<sup>5</sup> *Craig v. Shields*, 2 Am. L. J. 256.

<sup>6</sup> *McLaughlin v. Shields*, 2 Jones 283.

<sup>7</sup> Act 3d April 1851, § 7, Pamph. L. 318.

<sup>8</sup> *Myers v. Commonwealth*, 10 Casey 270.

<sup>9</sup> *Wray v. Miller*, 8 Harris 111.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Lessee of Duncan v. Robeson*, 2 Yeates 455.

<sup>12</sup> *Lessee of Grant v. Eddy*, *Ibid.* 150.

<sup>13</sup> *McCormick v. Meason*, 1 S. & R. 92.

uncertain duration, as where the defendant is seised in fee, liable, however, to be defeated by his dying and leaving children.<sup>1</sup> The case of an estate for life has been specially provided for by the legislature, as will be explained hereafter.<sup>2</sup> An inquisition is unnecessary in order to effect the sale of a lease for years.<sup>3</sup>

Where the estate levied on is a reversion or remainder dependent on a life estate, it may be sold without an inquisition, for no rents and profits are receivable by the reversioner or remainder-man.<sup>4</sup> And a lease for years may be sold without inquisition or condemnation.<sup>5</sup> The fact that the premises are mortgaged does not dispense with an inquisition.<sup>6</sup>

*May be waived.*—The Act of 1836 provides that the defendant in the execution, being at the time of the issue of the writ the owner of the estate levied on, or the person owning such estate by title from him, may, by writing filed in the proper court, dispense with and waive an inquisition, and in such case the sheriff may, after giving notice in the manner subsequently provided, proceed to sell such real estate upon the *fi. fa.* before its return day, without any other writ.<sup>7</sup> The form of a waiver may be found in Smith.<sup>8</sup>

Since this act, the rightful owner of the estate, whether in or out of possession, is the only person who may dispense with the inquisition.<sup>9</sup> And an insolvent assignor, after a voluntary assignment, is not such a person.<sup>10</sup> Before the Act of 1834, the heir, as such, was not a party to the record, and the personal representative of the decedent might waive inquisition on a *fi. fa.* against his lands.<sup>11</sup> And it has been doubted whether, since that act, a waiver by the personal representative, without the heirs, will authorize a sale.<sup>12</sup> But it is now settled that an administrator may confess judgment in a *scire facias* to revive a judgment entered against his decedent in his lifetime, and may waive inquisition in proceedings upon the judgment confessed.<sup>13</sup> A defendant, who has sold his interest subject to the lien of the judgment, cannot waive inquisition.<sup>14</sup> Nor, it seems, can an attorney at law by virtue of his general retainer.<sup>15</sup> Before the Act of 1836 the waiver might be made by an attorney in fact.<sup>16</sup> In a second sheriff's sale of land, as the property of the defendant in the execution under which the first sale was made, the defendant cannot waive the inquisition.<sup>17</sup> In regard to the form of the waiver, the act is only declaratory of the existing practice; there is no form of waiver prescribed.<sup>18</sup> There is nothing in the act which makes it compulsory to pursue the method pointed out; and as it is

<sup>1</sup> Stewart v. Kenower, 7 W. & S. 293.

<sup>2</sup> Post, Sect. VI., "Execution against Life Estate."

<sup>3</sup> Dalzell v. Lynch, 4 W. & S. 256. See Sowers v. Vic, 2 Harris 99.

<sup>4</sup> Humphreys v. Humphreys, 1 Yeates 427; Howell v. Woolfert, 2 Dallas 75; Burd v. Dansdale, 2 Binn. 80; Macalister v. Wistar, 2 Miles 156.

<sup>5</sup> Dalzell v. Lynch, 4 W. & S. 255.

<sup>6</sup> Naples v. Minier, 3 Pa. R. 475.

<sup>7</sup> Act 16th June 1836, § 45, Purd. Dig. 439, § 52, Pamph. L. 769. This

is a modification of Act 6th March 1820,

§ 1. 7 Sm. Laws 255.

<sup>8</sup> Smith's Forms 377, pl. 22.

<sup>9</sup> McLaughlin v. Shields, 2 Jones 283.

<sup>10</sup> Pepper v. Copeland, 2 Miles 419.

<sup>11</sup> Hunt v. Devling, 8 Watts 405.

<sup>12</sup> Sample v. Barr, 1 Casey 457.

<sup>13</sup> Bennett v. Fulmer, 13 Wright 155.

<sup>14</sup> Wolf v. Payne, 11 Casey 97.

<sup>15</sup> Hadden v. Clark, 2 Grant 107.

<sup>16</sup> Cash v. Tozer, 1 W. & S. 525.

<sup>17</sup> Hadden v. Clark, 2 Grant 107.

<sup>18</sup> Kimball v. Kelsey, 1 Barr 183.

for the benefit of the debtor, there is nothing in the way to prevent him from consenting in some other mode, as by writing merely, by acceptance of the purchase-money, or in other ways, that may estop him in equity from asserting title to the estate.<sup>1</sup> Therefore, where the waiver was contained in a warrant of attorney to confess judgment, and a memorandum of the waiver was made upon the record, though the warrant itself was not filed it was sufficient.<sup>2</sup> So it matters not whether the waiver be filed before or after the sale; it is enough if the plaintiff has the written authority before he proceeds upon the *fi. fa.*, and it is returned with his proceedings.<sup>3</sup> In practice it is usually handed to the sheriff and returned with the *fi. fa.*<sup>4</sup>

And circumstances may amount to a waiver, or estop the defendant from showing the want of an inquisition.<sup>5</sup> Thus, if the defendant acquiesce, and permit the sheriff's deed to be acknowledged without objection, he cannot avail himself of the irregularity.<sup>6</sup> Though this was formerly otherwise.<sup>7</sup> At all events, he is estopped when he has induced the sheriff's vendee to become the purchaser, and the proceeds have been applied to the payment of his debts.<sup>8</sup> So he and all claiming under him are estopped by his subsequent release to the purchaser, and delivery of possession.<sup>9</sup> Under such circumstances his interest passes by the sale, and a second sale of the same land, under another execution against him, will confer no title on the purchaser.<sup>10</sup>

A waiver of inquisition is not incompatible with a claim for the benefit of the Exemption Law.<sup>11</sup>

*When and where the inquisition is to be held.*—The sheriff must give at least five days' notice of the time and place of the holding of the inquisition to the defendant, or if he is not in the county, to his attorney or agent, and if the latter is unknown to the sheriff, the notice must be given by a handbill fixed upon the premises.<sup>12</sup> Under the Act of 1806, and subsequent statutes, the omission to give notice of an inquisition was an irregularity for which the sale might have been set aside, but which was cured by the payment of the purchase-money and acknowledgment of the sheriff's deed.<sup>13</sup> If there be no notice in fact either of the levy or the inquisition, the proceedings cannot be supported.<sup>14</sup> It is usually held the Friday preceding the return day of the process. There is, however, nothing in the act which precludes the sheriff from holding an inquest after the return day of the *fi. fa.*, and such has always been the practice when found necessary. Therefore, when the inquest has been

<sup>1</sup> Mitchell v. Freedley, 10 Barr 209, per ROGERS, J.

<sup>2</sup> Kimball v. Kelsey, 1 Barr 183, citing Overton v. Tozer, 7 Watts 333.

<sup>3</sup> Overton v. Tozer, 7 Watts 333.

<sup>4</sup> Ibid.

<sup>5</sup> Wray v. Miller, 8 Harris 111. See Mitchell v. Freedley, 10 Barr 209.

<sup>6</sup> Spragg v. Shriver, 1 Casey 282.

<sup>7</sup> Shoemaker v. Ballard, 3 Harris 92; Baird v. Lent, 8 Watts 422.

<sup>8</sup> Spragg v. Shriver, 1 Casey 282.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Shaw's Appeal, 13 Wright 177.

<sup>12</sup> Act 16th June 1836, § 46, Purd. Dig. 440, pl. 54, Pamph. L. 769. This is taken from Act 21st March 1806, § 11, 4 Sm. Laws 331.

<sup>13</sup> Meanor v. Hamilton, 3 Casey 137.

<sup>14</sup> Heydrick v. Eaton, 2 Binn. 217.

quashed for irregularity, he may proceed to hold a new one without a new *fi. fa.*<sup>1</sup> The day on which the inquisition is taken is not a matter of record but a matter *in pais*; when a blank for the date is left in it the time may be shown by parol evidence, but not by the sheriff's docket.<sup>2</sup>

If required by the defendant or his agent, and notice of the requisition be given to the officer executing the writ, the inquisition must be held upon the premises.<sup>3</sup>

*Proceedings under the inquisition.*—It is necessary for the plaintiff or his attorney to attend before the inquisition with a statement and evidence of the nature and amount of the encumbrances which may exist upon the land in the shape of mortgages, judgments, taxes, ground-rents, &c., in order to effect a condemnation.

The jury of inquiry must consist of at least twelve men, who, together with the sheriff, compose what is denominated a court of inquiry. The sheriff's presence does not vitiate the proceedings if he does not improperly interfere.<sup>4</sup> It is the duty of the jury to fix the clear annual value of the land beyond all reprises, which include expenses of repairs, taxes, costs, trouble, &c.<sup>5</sup> They are bound to take into consideration mortgages against the estate, which are clearly included in the term "reprises;" and the instalments of a mortgage becoming due within the seven years next after inquisition, ought to be regarded by them in their judgment.<sup>6</sup> They should take into consideration all liens which will become payable within the seven years.<sup>7</sup> But the unpaid purchase-money due on articles of agreement between vendor and vendee is not such a lien as is proper to be taken into consideration by the sheriff's jury.<sup>8</sup> It is the uniform practice to calculate the interest upon judgments for the seven years.<sup>9</sup> "In all the counties where I was acquainted with the practice," says Judge Coulter, "they add seventeen per cent. interest to the liens, and then add all the costs, fix the net annual rent beyond repairs and taxes, and payable at the commencement of the year; and if this will pay the debt and interest of all the liens, with the interest and costs, the land is extended, and either the defendant or plaintiff must take it at that valuation."<sup>10</sup>

In estimating the annual value of the land, the usual mode is for the jurors to make separate estimates, and, after adding them together, return the medium value as their valuation. The propriety of this course has been recognised where it is resorted to, not as a decision of the question, but as an approximation to unanimity by the inquest.<sup>11</sup> In the case of developed mineral lands the jury must take into consideration the amount of rent or mineral-leave paid, and which the estate may produce from the mines, and estimate the

<sup>1</sup> Weaver v. Lawrence, 1 Dallas 379.

<sup>2</sup> Thomas v. Wright, 9 S. & R. 87.

<sup>3</sup> Act 16th June 1836, § 47, *Purd.* Dig. 440, pl. 55, *Pamph. L.* 769. This is taken from Act 21st March 1806, § 11. 4 *Sm. Laws* 331.

<sup>4</sup> White v. White, 5 *Rawle* 61.

<sup>5</sup> Mellon v. Campbell, 1 *Jones* 416.

<sup>6</sup> Pulaski v. King, 1 *Yeates* 477; *Corporation v. Wallace*, 3 *Rawle* 142.

<sup>7</sup> Near v. Watts, 8 *Watts* 325.

<sup>8</sup> Springer v. Walters, 10 *Casey* 328.

<sup>9</sup> 1 *Sm. Laws* 63, n.

<sup>10</sup> Mellon v. Campbell, 1 *Jones* 416.

<sup>11</sup> White v. White, 5 *Rawle* 61.

rent or mineral leave, with the other rents and profits of the estate for the seven years.<sup>1</sup>

If the jury act improperly, as by refusing to hear evidence of the yearly value of the premises, or otherwise, the defendant's mode of redress is by a timely application to the court whence the process issues to quash the inquisition; it is too late to raise such objection in an ejectment instituted for the property after the condemnation and sheriff's sale.<sup>2</sup>

So the court will set aside an inquisition where it clearly appears that the sum affixed is extravagantly high. And where the court below assigned an insufficient reason for setting aside an inquisition and extent, the Supreme Court being of opinion that the court below were convinced that the jury had valued the land too highly, refused to reverse the judgment.<sup>3</sup> Where the plaintiff produced an affidavit, which showed that the lands could not possibly pay the debt by extent, the court quashed the execution at the costs of the plaintiff, who was desirous that it should be set aside in order that he might pursue another course.<sup>4</sup> But after a *fi. fa.* executed and lands extended, it is not a sufficient reason for setting it aside, that, since the inquisition, sufficient personal property has been found.<sup>5</sup>

The jury cannot enlarge the sheriff's levy as returned.<sup>6</sup>

The jury are not entitled to an allowance for expenses beyond the compensation allowed by law.<sup>7</sup>

*Return of the inquisition and fi. fa.*—The sheriff must return the inquisition, along with the writ, to the court.<sup>8</sup> The return is substantially "that the rents and profits will pay the debt in seven years," with an estimate of the annual value of such rents or profits, or else "that the profits are not sufficient to pay the debt in seven years." In the former alternative, the lands are to be extended or delivered to the plaintiff until, from the rents, issues, and profits, he has repaid himself, or else they are to be delivered to the defendant at the assessed annual value, which is to be paid to the plaintiff until his debt, with interest and costs, has been discharged.<sup>9</sup> In the latter alternative, when the inquest has found the rents, &c., insufficient to discharge the debt in seven years, the plaintiff may proceed to have the lands sold. But before explaining the practice in these cases we shall consider the effect and nature of the return.

The return is not final; the court will set it aside on sufficient ground being shown, as that the estimate of the value of the land is too high, or that the jurors have misconducted themselves, or will quash it for irregularity.

As regards the plaintiff, an inquest finding lands sufficient to pay in seven years is not equivalent to satisfaction; the *fi. fa.* may be

<sup>1</sup> Act 4th May 1852, § 3, *Purd. Dig.* Yeates 111.  
<sup>2</sup> 410, pl. 56, *Pamph. L.* 569.

<sup>3</sup> *Lessee of Murphy v. McCleary*, 3 *Yates* 405.

<sup>4</sup> *Milner v. Milford*, 2 S. & R. 35, 38.

<sup>5</sup> *Hunt v. McClure*, 2 *Yeates* 387.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Lessee of Rodgers v. Gibson*, 4

<sup>8</sup> *Wall v. Lloyd's Executors*, 1 S. & R. 320.

<sup>9</sup> Act 16th June 1836, § 44, *Purd. Dig.* 439, pl. 51, *Pamph. L.* 769.

<sup>10</sup> Act 13th October 1840, §§ 2, 3, *Purd. Dig.* 441, pl. 65, 68, *Pamph. L.* 2.



discontinued on leave of court, and an *alias* had against other property, or plaintiff may await the sale of the original subject of levy on other executions, and then come in on the proceeds;<sup>1</sup> so if land be extended under one inquisition, the plaintiff will not be precluded from issuing an execution on another co-existent judgment, levying on the same land, and having another inquisition, even though both judgments were brought into the view of the first jury.<sup>2</sup>

After an inquest has returned that the rents and profits will pay the debt in seven years, the plaintiff cannot discontinue his *fi. fa.*, and take out a new one, without leave of the court. This has been the practice and understanding of the courts of Nisi Prius, and great inconveniences might ensue from a contrary practice; because the plaintiff might set aside the proceedings, and levy again on the same land repeatedly, until he got a jury to condemn it, which would be taking away from the defendant the benefit of the Act of Assembly on this subject.<sup>3</sup> But where land was extended on a *fi. fa.*, and upon motion the inquisition and extent were set aside, and some time afterwards the plaintiff took out an *alias fi. fa.* whereon the same land was levied upon and sold, it being objected that as only the inquisition under the first *fi. fa.* was set aside, the writ and levy remained, which made the second *fi. fa.* erroneous; it was held that the first *fi. fa.* was in form relinquished, though not in substance; and as it was the cause of no hardship to the defendant, who would be protected against unnecessary costs, the court upheld the second *fi. fa.*<sup>4</sup> In the former case the plaintiff attempted to relinquish his inquisition after the property was found sufficient to pay in seven years, but here the inquest was set aside; the matter rested solely on the levy, which may be relinquished, provided the defendant be protected against unnecessary costs.<sup>5</sup>

The return is made on the back of the writ, which is then filed with the prothonotary before or on the day on which the rule to return it expires. In the description of the property in the levy, which makes a part of the return, it is not necessary to set forth the deed or title under which the defendant holds.<sup>6</sup> The description of the property should be by metes and bounds; a levy and sale is a mere nullity where it affects to pass all the defendant's property in general terms, such as "all his property in Pennsylvania," &c.: but as it is not in the power of the sheriff or plaintiff always to ascertain precisely the details of a defendant's property, a reasonable degree of latitude is allowed in the description;<sup>7</sup> and if the description is not in the defendant's opinion perfectly precise, he may have relief by application to the sheriff, or court, to correct it before the acknowledgment of the sheriff's deed.<sup>8</sup> He cannot take advantage of such defect after lying by, and allowing the purchaser to pay his money and receive his deed.<sup>9</sup>

<sup>1</sup> Gro v. Huntingdon Bank, 1 Pa. R. 426; Lyons v. Ott, 6 Whart. 165.

<sup>2</sup> Gist v. Wilson, 2 Watts 30.

<sup>3</sup> McCullough v. Guetner, 1 Binn. 215; and see Miller v. Milford, 3 S. & R. 37; Wilson v. Howson, 2 Jones 115.

<sup>4</sup> Miller v. Milford, 2 S. & R. 37.

<sup>5</sup> Ibid.

<sup>6</sup> Buckholder v. Sigler, 7 W. & S. 154.

<sup>7</sup> See Palmer's Case, 4 Co. 74; Inman

v. Kutz, 10 Watts 90.

<sup>8</sup> Heartley v. Beaum, 2 Barr 172.

<sup>9</sup> Ibid.

If the return is intelligible of itself, and ascertains with precision the tract taken in execution, no room for explanatory proof is afforded, and none will be received to contradict the official act; but where either from the generality of the terms used, uncertainty of delineation, or seeming contradiction of description, a doubt is raised affecting the boundaries of the levy, its locality or extent, recourse must be had to evidence *aliunde*, in which case it becomes a legitimate object of investigation for a jury.<sup>1</sup> So where a levy was made on two tracts of land, but in the inquisition it was stated that "the rents, issues, and profits of a certain piece or parcel of land set forth and described in the annexed schedule" (meaning the levy), "are not sufficient to satisfy the debt," the uncertainty as to whether both tracts were acted upon by the inquest, or only one of them, may be removed by parol proof: therefore one party may show that the inquest acted upon one tract only, and the other may show the value of the rents and profits of the tract in dispute.<sup>2</sup> And where it was uncertain, from the levy, which of two tracts of land was levied on, the fact of the election of one of the tracts by the purchaser may, after the lapse of many years, be taken into consideration by the jury, in connection with other facts, in deciding which of the two tracts had been levied upon.<sup>3</sup>

The court, in a proper case, will allow a return to be amended, upon application, supported by affidavits, made at any time prior to the acknowledgment of the sheriff's deed, provided intervening rights would not be injured thereby.<sup>4</sup>

*Approval by court.*—In case of condemnation the Act of 1836 requires the court to approve the inquisition.<sup>5</sup> The defendant alone can take advantage of the want of approval by the court of the inquisition condemning the land, and that only within a reasonable time.<sup>6</sup> In case of condemnation it has not been the practice to obtain a formal approval of the inquisition before suing out the *vend. exp.* It seems that the issuing of that writ being in contemplation of law the act of the court, is sufficient approval to satisfy the Act of 1836, at least as to strangers.<sup>7</sup>

Formerly, when the inquisition had been quashed for irregularity, the sheriff might proceed to hold a new inquest without a new *fi. fa.*, and after the return of the former.<sup>8</sup>

*Proceedings where lands are extended.*

1. *Liberari facias.*—We have already mentioned that if the jury find that the rents, &c., of the land are sufficient to pay the judgment with interest and costs in seven years, the sheriff must then proceed to assess by the inquest the annual value of the rents and profits, and return the same with the *fi. fa.* to the court.<sup>9</sup> Upon this the plaintiff may have a writ of *liberari facias*, commanding the sheriff to deliver to him the lands, with their appurtenances, at the

<sup>1</sup> Hoffman v. Danner, 2 Am. L. J. 574.

<sup>2</sup> Shoemaker v. Ballard, 3 Harris 92.

<sup>3</sup> St. Clair's Heirs v. Shale, 8 Harris 105.

<sup>4</sup> See ante, p. 873 et seq., as to the effect of a return and allowing amendments.

<sup>5</sup> Sect. 61, Purd. Dig. 442, pl. 71, Pamph. L. 772.

<sup>6</sup> Crawford v. Boyer, 2 Harris 380.

<sup>7</sup> Ibid.

<sup>8</sup> Weaver v. Lawrence, 1 Dallas 379.

<sup>9</sup> Act 16th June 1836, § 48, Purd. Dig. 440, pl. 58, Pamph. L. 769.

valuation and appraisement made by the inquest, to be held by him, his executors, administrators, and assigns, until the debt or damages, with interest from the day of the judgment rendered, be fully levied thereout.<sup>1</sup>

One whose judgment is a lien, and who is proceeding with all diligence to execute it, cannot be intercepted or defeated by another judgment-creditor, whose judgment is not a lien, but who obtains a judgment of revival under an agreement with the defendant, and immediately issues a *liberari facias*, the defendant agreeing, in order to make the writ good, that a *fi. fa.*, levy, condemnation, and an appraisement of rent be considered as having been had: in such case the *liberari* is irregular, and a fraud upon the first lien and execution creditor.<sup>2</sup> A *liberari* requires a *fi. fa.*, levy, and inquisition to support it.<sup>3</sup>

Under this writ, when the defendant, or any person claiming under him, by demise or title subsequent to the judgment, is in possession of the premises to be extended, the sheriff must deliver actual possession thereof to the plaintiff or his agent.<sup>4</sup> And where he returned "executed as within commanded," it was held that the plaintiff could not take out an *alias liberari facias*, although evidence was given to show that actual possession had not been delivered.<sup>5</sup> The sheriff must return the manner of executing the writ.<sup>6</sup> And is liable for a false return.<sup>7</sup>

If the premises are occupied under an existing lease, given by the defendant prior to the judgment, the sheriff should return that fact specially, because the plaintiff would be entitled to receive and compel payment of the arrearages of the rent in liquidation of the debt; a return that he had delivered possession, without more, renders him liable for a false return.<sup>8</sup>

In following the manner and method of delivering lands upon writs of *elegit* in England, it was formerly conceived that the sheriff, on a *liberari facias*, could only deliver the legal possession to the plaintiff, but could not turn the defendant out of the *actual* possession, and that recourse should be had to an action of ejectment to obtain the benefit of this process.<sup>9</sup> To remedy this mischief, it was provided by the Act of April 1807, § 6,<sup>10</sup> which is supplied by the act just cited, "that on the execution of a *liberari facias*, where the defendant or his tenant is in possession of the premises to be extended, the sheriff shall deliver the actual possession thereof to the plaintiff or his agent."<sup>11</sup> The mere return to the *liberari* by the sheriff, that he had delivered possession to the plaintiff, does not vest the title in such plaintiff; it is only an authority to enter, and he must obtain the *actual* possession, or bring an ejectment, before it can be considered, in an ejectment between others, as a subsisting title in him.<sup>12</sup> When, under the old law, possession was delivered

<sup>1</sup> Act 16th June 1836, § 49.

<sup>2</sup> Bank of Pa. v. Bayard, D. C. Lancaster, 7 P. L. J. 306.

<sup>3</sup> Ibid.

<sup>4</sup> Act 16th June 1836, § 50.

<sup>5</sup> Sawyer v. Curtis, 2 Ash. 127.

<sup>6</sup> Act 16th June 1836, § 48.

<sup>7</sup> McMichael v. McKeon, 10 Barr 143.

<sup>8</sup> Ibid.

<sup>9</sup> 1 Sm. Laws 63, n.

<sup>10</sup> 4 Ibid., 477.

<sup>11</sup> See Thomas v. Wright, 9 S. & R. 92.

<sup>12</sup> Ibid., 87.

on a *liberari facias* by the sheriff, or taken by the consent of the parties, it was held to operate as a satisfaction of the debt.<sup>1</sup> A recital in the body of the inquisition, that the sheriff had delivered the premises in satisfaction of the debt, was held inoperative, as being no part of the return till made so by reference from the endorsement on the writ, which, for that purpose, ought to be in these or similar words: "The execution of this writ appears in a certain schedule hereunto annexed."<sup>2</sup>

The person to whom the estate is delivered, his heirs, successors, or assigns, are entitled to quiet possession thereof, as fully and amply, and for such estate and estates, and under the same rents and services, as the defendant was entitled to before the execution.<sup>3</sup>

Where two or more writs of *liberari facias* are in the hands of the sheriff at the same time, against the same land, they are to be executed according to the priority of the respective judgments on which they issue; but an extent already made cannot be disturbed by another writ of *liberari facias*, though founded on a judgment prior to that under which the extent was made.<sup>4</sup> In case a judgment is recovered against lands already under extent, and cannot be satisfied in seven years out of the profits, after deducting what remains due under the extent, the land may be condemned by the inquisition, and sold under a *fi. fa.*;<sup>5</sup> and in that case the plaintiff in the extent must account for the profits and rents already received, and will be entitled to receive the balance of his debt, if any, out of the proceeds of the sale of the land.<sup>6</sup> If the plaintiff, before his judgment, &c., is satisfied, without any fraud, collusion, or other default on his part, be legally evicted from the land taken by him under the extent, he may revert to the original judgment, and have a *scire facias* to compel the defendant to show cause why he should not have execution for the residue of the judgment.<sup>7</sup>

The Act of 1836 provided in several sections means of compelling the plaintiff to account for the profits, and if he should prove to have been satisfied, to deliver up the land and repay over to defendant whatever surplus he had received, but these sections have all been repealed, and nothing has been substituted in their place.<sup>8</sup> It has been held that the assessment returned by the sheriff is *prima facie*, but not conclusive, evidence of the annual value as against the plaintiff, to whom the lands were delivered.<sup>9</sup> And of course it is not conclusive in his favor, for it may as easily be too small as too large. He is bound to account for the proceeds, and these are satisfaction to the amount which he has or might have received.<sup>10</sup>

If the plaintiff held over, after receiving in full his debt, with interest and costs out of the profits, the defendant might, under the

<sup>1</sup> *Barnet v. Washebaugh*, 16 S. & R. Whart. 165.  
410.

<sup>2</sup> *Shewell v. Meredith*, 3 Pa. R. 17.

<sup>3</sup> Act 16th June 1836, § 66, *Purd.*  
Dig. 443, pl. 78, *Pamph. L.* 773.

<sup>4</sup> Act 16th June 1836, § 51, *Purd.*  
Dig. 440, pl. 61, *Pamph. L.* 770.

<sup>5</sup> *Ibid.*, § 58, *Purd. Dig.* 440, pl. 62.

<sup>6</sup> *Ibid.*, § 59; *Gro v. Huntingdon*  
*Bank*, 1 Pa. R. 426; *Lyons v. Ott*, 6

<sup>7</sup> *Ibid.*, § 60.

<sup>8</sup> Act 16th June 1836, §§ 52-57. Repealed by Act 13th October 1840, § 9, *Pamph. L.* 1841, 3.

<sup>9</sup> *McKelvy v. De Wolfe*, 8 Harris 374.  
See *Wall v. Lloyd's Executors*, 1 S. & R. 320.

<sup>10</sup> *Slater's Appeal*, 4 Casey 169.

St. West. II., cap. 18, have a *scire facias ad computandum et rehabendam terram*, to compel him to account for the profits, and to restore the land, if it appeared that his judgment had been satisfied. And this process was also allowed under our Act of 1705,<sup>1</sup> and under the repealed sections of the Act of 1836. Now, it is doubtful whether it could issue in such case, though it has been intimated that the defendant still has this remedy.<sup>2</sup>

After a judgment against the plaintiff, on a *sci. fa. ad comp. et rehabend. terram*, it was a sufficient return to a writ of restitution, that the sheriff did not find the plaintiff in the extent; nor any person holding or claiming to hold under him, in the possession of the premises, but that he found A. B. and C. D. in possession, claiming title thereto in fee simple, wherefore he could not deliver possession to the party named in the writ; under the writ of restitution, the sheriff could not disturb the possession of one occupying the premises by independent title.<sup>3</sup>

On a motion to set aside an extent, the court will inquire whether the judgment is a lien.<sup>4</sup>

*Costs.*—Upon the extending of the land, the sheriff is entitled to poundage on the whole debt, under a former Act of Assembly. But poundage cannot be again charged on the balance due the plaintiff on the *liberari facias*, and which the sheriff receives when the land is sold under the act just mentioned.<sup>5</sup> The sheriff cannot charge for attendance; and the jury being entitled to no more than the compensation given by law for their attendance, must bear their own expenses; a charge of this kind will, on application, be stricken off.<sup>6</sup>

Neither the plaintiff nor his agent can charge a commission for collecting rents.<sup>7</sup>

2. *Retention of the lands by the defendant at the valuation.*—Instead of suing out the writ of *liberari facias*, the plaintiff may, at his election, permit the defendant, or any person claiming under him, by demise or title subsequent to the judgment, to retain possession of the real estate at the annual valuation and appraisement found by the inquest.<sup>8</sup> The form of such election is given by Smith.<sup>9</sup> If the defendant consent to retain the lands, he must pay the annual valuation to the plaintiff in equal semi-annual payments, commencing six months from the day the defendant notifies the sheriff of his consent, and on default made for thirty days after any payment is due, the plaintiff, his agent or attorney, upon making and filing an affidavit thereof, may issue a *venditioni exponas*, and sell the land, just as if it had been condemned.<sup>10</sup> The form of the affidavit may be found in Smith.<sup>11</sup> The plaintiff is not chargeable with

<sup>1</sup> 1 Sm. 58; *Carlisle v. Cunningham*, R. 320.  
<sup>1</sup> Dallas 81.

<sup>2</sup> *Mellon v. Campbell*, 1 Jones 418, per COULTER, J. The practice in *sci. fa. ad comp.*, &c., will be explained under this head in our second volume.

<sup>3</sup> *Commonwealth v. Straub*, 11 Casey 137.

<sup>4</sup> *Pray v. Brock*, 2 P. L. J. 341.

<sup>5</sup> *Wall v. Lloyd's Executors*, 1 S. &

<sup>6</sup> *Ibid.*

<sup>7</sup> *Mellon v. Campbell*, 1 Jones 415.

<sup>8</sup> Act 13th October 1840, § 2, *Purd. Dig.* 441, pl. 65, *Pamph. L.* 2.

<sup>9</sup> *Smith's Forms*, 378, pl. 23.

<sup>10</sup> Act 13th October 1840, § 3; *Black v. Aber*, 2 Grant 206. See the Form of Acceptance, *Sm. Forms*, 379, pl. 24.

<sup>11</sup> *Smith's Forms*, 379, pl. 25.

the rental, as satisfaction, until he has received it; and the failure to issue a *vend. exp.* against the defaulting defendant is no satisfaction of the debt, or ground for postponing plaintiff's lien.<sup>1</sup> The semi-annual payments must be made to the plaintiff in the writ, whether or not he, his agent, or attorney, reside in the county;<sup>2</sup> payment to the sheriff of the *proper* county is effectual only in case the court award the money to another than the plaintiff in execution, and that other does not reside in the county.<sup>3</sup>

*Notices.*—The plaintiff or his attorney may give notice to the sheriff, at any time after the inquisition, and before the execution of the *liberari facias*, of his intention to permit the defendant, or other person entitled, to retain the lands at the appraisement. The sheriff, within ten days after receiving notice from the plaintiff, must notify the defendant, or other person entitled, &c., of the plaintiff's intention.<sup>4</sup> A notice to the defendant, signed by the attorney of the plaintiff, instead of the sheriff, is a substantial compliance with the act, and if irregular is cured by the acknowledgment of the sheriff's deed, the land having been subsequently sold on a *vend. exp.*<sup>5</sup> After receiving this notice from the sheriff the defendant must, within thirty days, notify the sheriff of his willingness to retain the real estate at the valuation,<sup>6</sup> and the sheriff must endorse on said notice the date of his receiving it.<sup>7</sup> All these notices must be in writing, signed by the parties or their attorneys; and must be served by delivering a copy to the party, plaintiff or defendant, or to the person in possession of the real estate, or leaving the same at his residence with an adult member of his family; of all which the sheriff must make return according to law; and he is entitled to mileage, as in other cases.<sup>8</sup>

If the defendant neglect or refuse, within thirty days after receiving notice of the plaintiff's permission, to notify the sheriff of what he elects to do, the plaintiff may have a writ of *venditioni exponas* to sell the lands.<sup>9</sup>

If the defendant notifies the sheriff of his refusal to retain the lands at the valuation, the plaintiff is thrown upon his remedy to take the lands himself under a *liberari facias*.<sup>10</sup>

*Where there are several liens on the land.*—When the defendant retains the land, and the sheriff has so returned, and there are more liens against it than that of the plaintiff, the court, on the application of any creditor, may make an order directing the manner in which the semi-annual payments shall be distributed among the lien-creditors, according to the priority of their liens, in the mode pursued in distributing the proceeds of sheriff's sales; and the defend-

<sup>1</sup> Slater's Appeal, 4 Casey 169.

<sup>2</sup> *McMurtrie v. Frazer*, 2 Casey 391.

<sup>3</sup> *Ibid.* See *infra*, "Where there are several liens," &c.

<sup>4</sup> Act 13th October 1840, § 2, Pamph. L., 1841, p. 2, modified by Act 10th February 1846, § 1, Pamph. L. 38. Even before the Act of February 1846, the provision in the Act of 1840 that notice must be given to the defendant in ten days after the inquisition, was

perhaps merely directory: *Shields v. Miltenberger*, 2 Harris 77, BELL. J.

<sup>5</sup> *Shields v. Miltenberger*, 2 Harris 76.

<sup>6</sup> Act 13th October 1840, § 2, *ubi supra*.

<sup>7</sup> *Ibid.*, § 3.

<sup>8</sup> *Ibid.*, § 2. See the Forms of Notices, Smith's Forms, 378, pl. 23, 24.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Mellon v. Campbell*, 1 Jones 416.

ant, or person in possession of the estate, must pay such instalments to the plaintiff, or party entitled to receive the same under such decree, or to his agent or attorney, or to the sheriff of the proper county, where such plaintiff or person, his agent, or attorney resides out of said county.<sup>1</sup> The form of this application to the court is given by Smith.<sup>2</sup> And where defendant retains the land, no second or other inquisition and extent can be allowed, during the pendency of the first, on any writ issued on a judgment which was entered in the court of the proper county at the date of the first inquisition, but the plaintiff in such judgment, or other person claiming to have a lien upon such real estate, may proceed to collect the same in the manner above mentioned.<sup>3</sup> But this does not prohibit a judgment-creditor, whose judgment was entered before a part of the lands had been extended at the suit of another judgment-creditor, from levying on other real estate of defendant not included in the first extent.<sup>4</sup>

It is only in case the court have decreed the fund to some other than the plaintiff in the inquisition, and such other person, his agent or attorney, does not reside in the county, that the payment may be made to the sheriff; if there be no such decree, the payment must be to the plaintiff, whether he, his agent or attorney, reside in the county or not.<sup>5</sup> A mortgage-creditor, whose lien would not have been discharged by a sale, is not entitled to the fund.<sup>6</sup>

Where judgments are entered subsequently to the extent, the amount of which, together with what remains due on the extent, cannot be paid out of the profits in seven years, the land may still be condemned, either at the instance of the subsequent judgment-creditors,<sup>7</sup> or at the instance of the plaintiff in the writ under which the extent was made.<sup>8</sup> In the former case the sheriff must certify the facts upon the return of the executions, and thereupon a *vend. exp.* may issue;<sup>9</sup> when the condemnation is sought by the plaintiff, he must apply to the court for an *alias fi. fa.*, and have the lands condemned, and issue a *vend. exp.*; but if the *alias* be taken out without leave of the court, and the lands condemned and sold, the sale will be set aside at the instance of the defendant, if application be made before acknowledgment of the sheriff's deed.<sup>8</sup>

After lands have been extended, the plaintiff cannot discontinue the *fi. fa.*, and take out a new one without leave of the court.<sup>10</sup> But if this was done, and the land condemned and sold, and the sheriff's deed acknowledged, without objection on the part of the defendant, every intendment will be made in favor of the purchaser.<sup>8</sup>

*Proceedings after condemnation. Venditioni exponas.*—If the

<sup>1</sup> Act 13th October 1840, § 4, Purd. Dig. 441, pl. 69, Pamph. L. 2.

<sup>2</sup> Smith's Forms 379, pl. 26.

<sup>3</sup> Act 26th April 1855, § 1, Purd. Dig. 442, pl. 70, Pamph. L. 313.

<sup>4</sup> Curtis v. Cook, 10 Casey 244.

<sup>5</sup> McMurtrie v. Frazer, 2 Casey 391.

<sup>6</sup> *Quere*, in case of a *testatum writ*, should such payment be made to the sheriff of the county where the lands

lie, or of the county whence the writ issued? *Ibid.*

<sup>7</sup> Bank v. Patterson, 9 Barr 311.

<sup>8</sup> Act 16th June 1836, § 58, Purd. Dig. 440, pl. 62, Pamph. L. 771.

<sup>9</sup> Wilson v. Hewser, 2 Jones 115.

<sup>10</sup> Act 16th June 1836, § 58, Purd. Dig. 440, pl. 62, Pamph. L. 771.

<sup>11</sup> McCullough v. Guetner, 1 Binn. 214.

inquest find that the profits will not be sufficient to satisfy the debt or damages in execution, and the costs of suit within seven years, and the sheriff has duly certified to that effect upon his return to the *fi. fa.*, and the court approve the finding, the plaintiff may have a writ of *venditioni exponas* to sell the land for and towards the satisfaction of his judgment.<sup>1</sup>

Where an inquisition has been held, and the land condemned on one writ, it is unnecessary that the other judgment-creditors should go to the expense of new inquisitions, but they may issue writs of *venditioni exponas* without another inquisition.<sup>2</sup> And where the lands have been extended, and other executions, on judgments entered subsequent to the inquisition, are issued, the amount of which, with what remains due on such extent, cannot all be satisfied out of the yearly profits in seven years, the sheriff must certify the same by inquisition upon the return of such writs of execution, and thereupon a writ or writs of *venditioni exponas* may issue.<sup>3</sup> Though the act requires that the finding should be approved by the court, it has not been the practice to obtain a formal approval before suing out a *vend. exp.*: it seems that the issuing of the writ being in contemplation of law the act of the court, it is a sufficient approval to satisfy the Act of 1836, at least as to strangers.<sup>4</sup> But a sale on a *vend. exp.* without an inquisition, or a waiver thereof, has been held void, and not cured by acknowledgment of the sheriff's deed;<sup>5</sup> though, under certain circumstances, the defendant may be estopped from showing the want of an inquisition.<sup>6</sup>

*When the vend. exp. issues.*—Unless preceded by a *fi. fa.* the *vend. ex.* is irregular, and a sale under it will be set aside on motion, though the land was condemned under a *fi. fa.* on another judgment against the same defendant.<sup>7</sup> A *vend. exp.* after a lapse of five years from the issue and levy of a *fi. fa.* is irregular, and on motion would be set aside, and a *sci. fa. post ann. et diem* required.<sup>8</sup> But such irregularity is insufficient to avoid a sheriff's deed in the collateral suit of ejectment, for the *sci. fa.* is for the protection of the debtor and he may waive it, as is frequently done, and in that case neither he nor those claiming under him could take advantage of the irregularity to question the validity of the sale.<sup>9</sup>

If defendant die after levy and condemnation, a *vend. exp.* cannot issue without a previous *scire facias* against his personal representatives.<sup>10</sup>

It is irregular to issue a *fi. fa.* and *vend. exp.* on the same day and to the same term, and will not be allowed if objected to before the sale.<sup>11</sup>

After inquisition and extension of the land a *vend. exp.* is irregu-

<sup>1</sup> Act 16th June 1836, § 61, Purd. Dig. 442, pl. 71, Pamph. L. 772.

<sup>2</sup> McCormick v. Meason, 1 S. & R. 98.

<sup>3</sup> Act 16th June 1836, § 58, Purd. Dig. 440, pl. 62, Pamph. L. 771.

<sup>4</sup> Crawford v. Boyer, 2 Harris 380.

<sup>5</sup> Shoemaker v. Ballard, 3 Harris 92; Baird v. Lent, 8 Watts 422.

<sup>6</sup> Spragg v. Shriver, 1 Casey 282. See ante, 982.

<sup>7</sup> Lippincott v. Tanner, 1 Miles 286.

<sup>8</sup> Hinds v. Scott, 2 Am. L. J. 34.

<sup>9</sup> Ibid.

<sup>10</sup> Wood's Executors v. Colwell, 10 Casey 92.

<sup>11</sup> Hadden v. Clark, 2 Grant 107.



lar, until after a notice to the defendant to accept the premises at the valuation.<sup>1</sup> If he accept, he is not in default until six months after he has filed his acceptance, and a *vend. exp.* cannot issue until thirty days have elapsed from the termination of the six months, nor until an affidavit of the non-payment of the semi-annual rental has been filed of record.<sup>2</sup>

*When necessary.*—Without this process a sheriff's sale of lands levied upon and condemned, is, in this State, invalid,<sup>3</sup> except in the case of a *scire facias* on a mortgage, where no *venditioni exponas* is necessary.<sup>4</sup> But, as has already been seen, both the inquisition and *vend. exp.* may be waived and the land sold under the *fi. fa.*

*Stay.*—While it is in the course of execution the plaintiff has control over it, and may stay it even at the sale.<sup>5</sup>

*Setting aside.*—Where a writ of error was taken after a *fi. fa.*, condemnation, and *vend. exp.* issued, but no sale made, the court refused to set aside the *vend. exp.*, and held that the writ of error was not a *supersedeas*.<sup>6</sup>

*Form of the writ.*—It is a mandate to the sheriff, reciting the *fieri facias* and the return thereto, and directing him to expose to sale the property therein described, and to have the proceeds with the writ in court at the return day.<sup>7</sup>

It should correspond with the return to the *fieri facias*, which controls all subsequent proceedings, and governs where there is a variance between them.<sup>8</sup> After acknowledgment of the sheriff's deed, and a lapse of forty years, the court will amend the writ, according to the levy on the *fi. fa.*, and to correspond with the terms of the deed.<sup>9</sup> A mere clerical error, such as a mistake in a party's name, or the omission of the prothonotary's signature (the seal of the court being attached), is amendable at any time by the court from which it issues, and even if error were brought, the Supreme Court would order an amendment.<sup>10</sup> And the omission of the name of one of the defendants in the *vend. exp.*, the advertisements, and the sheriff's deed, is amendable by the *præcipe* after the acknowledgment of the sheriff's deed, and during the trial of an ejectment brought by the purchaser at the sheriff's sale.<sup>11</sup> In an action against executors where the judgment was *de bonis testatoris*, it is not error that the writ directed a levy on the property of the defendants as executors.<sup>12</sup>

*Who may execute it.*—The *vend. exp.* is directed generally to the

<sup>1</sup> Black v. Aber, 2 Grant 206.

<sup>2</sup> Ibid.

<sup>3</sup> Lessee of Porter v. Neelan, 4 Yeates 108; Lessee of Glancy v. Jones, Ibid. 212. And see Cowden v. Brady, 8 S. & R. 507.

<sup>4</sup> Lessee of Glancy v. Jones, 4 Yeates 213.

<sup>5</sup> Shyrook v. Jones, 10 Harris 303.

<sup>6</sup> Bozarth v. Marshall, D. C. Phila., 1 Phila. Rep. 172.

<sup>7</sup> See Tidd's Pract. Forms 219.

<sup>8</sup> Grubb v. Guilford, 4 Watts 244.

See Owen v. Simpson, 3 Watts 87.

<sup>9</sup> De Haas v. Bunn, 2 Barr 335.

<sup>10</sup> Cluggage v. Lessee of Duncan, 1 S. & R. 120; McCormick v. Meason, 1 S. & R. 97; Peddle v. Hollingshead, 9 S. & R. 284-5.

<sup>11</sup> Sickler v. Overton, 3 Barr 325. See Thompson v. Phillips, 1 Bald. 247; Carpenter v. Cameron, 7 Watts 51; Feger v. Keefer, 6 Watts 297; Rodgers v. Gibson, 4 Yeates 111.

<sup>12</sup> McCormick v. Meason, 1 S. & R. 92.

sheriff of the county; and if the sheriff who receives it goes out of office before it is executed, his successor may proceed upon it to sell the property and make a deed to the purchaser.<sup>1</sup> So, if the sheriff who has levied under the *fi. fa.* goes out of office at any stage of the proceedings, all subsequent process is to be directed to and executed by his successor.<sup>2</sup>

*Sheriff's sale of land.*—The land of the defendant, in which he has more than a life estate, may be sold under the *feri facias* in the cases before mentioned, where an inquisition and condemnation are unnecessary, or have been waived by the defendant or other person entitled to do so. It may be sold under the *venditioni exponas*, where it has been regularly levied and condemned under the *feri facias*, or where, having been extended under the *fi. fa.*, subsequent judgments are entered and executions issued under which it is condemned; or where, having been accepted by the defendant at the valuation, default is made in the semi-annual payments; or where the sheriff has been unable to sell it under the *fi. fa.* for want of buyers, &c. Finally, it may be sold under a *levari facias*. It is designed to explain here certain general rules of proceeding which apply to all these cases, without regard to the special form of the writ under which the sale is made. For the proceedings peculiar to each form of writ, reference must be had to the appropriate title.

*Time of sale.*—The practice was formerly for the sheriff to sell under a *venditioni* at an adjourned day after the return day of the writ, and this has been repeatedly sanctioned by the Supreme Court, though always with considerable hesitation.<sup>3</sup> But now by the 45th section of the Act of 1836, the sheriff in case of a waiver of inquisition is directed to sell upon the *fi. fa.* before the return day.<sup>4</sup> And where no evidence existed of defendant's assent to a sale in such case made after the return day, it was held void though the sheriff returned that he had advertised and offered the property for sale on the return day, and adjourned it *by consent* to the day of actual sale, and although the sheriff's deed had been long previously acknowledged after exceptions thereto.<sup>5</sup> And such a sale is void as against the purchaser at a subsequent sheriff's sale under an encumbrance which would have been discharged by the former sale had that been valid.<sup>6</sup> After the return day the writ is spent, and is of no more virtue for the purposes of sale than if it had never existed.<sup>7</sup> And it has been said that the Act of 1836 requires *all* sheriff's sales of land to be made on or before the return day of the writ.<sup>8</sup>

But by the second section of the Act of 16th April 1845,<sup>9</sup> all sales of real estate by sheriffs or coroners may be made on or before the return day, or within six days thereafter. The first section of this act making valid sheriff's sales, made after the return day,

<sup>1</sup> Leshey v. Gardner, 3 W. & S. 314.

<sup>2</sup> Act 16th June 1836, § 101, *Purd. Dig.* 449, pl. 121, *Pamph. L.* 780.

<sup>3</sup> Gordon v. Kennedy, 2 Binn. 291; McCormick v. Meason, 1 S. & R. 192; Blythe v. Richards, 10 S. & R. 261. In some counties another *rend. exp.*, tested on the return day, was issued for greater

caution: 1 Sm. Laws 66, n.

<sup>4</sup> *Purd. Dig.* 439, pl. 52, *Pamph. L.* 769.

<sup>5</sup> Cash v. Tozer, 1 W. & S. 526.

<sup>6</sup> Dale v. Medcalf, 9 Barr 108.

<sup>7</sup> *Ibid.*

<sup>8</sup> McClenahan v. Humes, 1 Casey 88.

<sup>9</sup> *Purd. Dig.* 442, pl. 76, *Pamph. L.* 538.

prior to the passage of the act, has been decided to be unconstitutional.<sup>1</sup>

*Notice and advertisements.*—Before the sale the sheriff is required to prepare so many written or printed handbills as the defendant shall reasonably request, upon parchment or good paper, as may be sufficient to give notice of such sale, and of the day and hour and place at which it is to be held, and what lands, &c., are to be sold, and where they are situated; which notice must be given to the defendant, and one of the handbills must be fixed by the sheriff or other officer upon the premises, and the others of them in the most public places of the county or city, at least ten days before the sale.<sup>2</sup> Slips from the sheriff's advertisements cut from the newspapers, are not handbills.<sup>3</sup> If the sheriff has omitted to fix one of the handbills on the premises ten clear days before the sale, it will be set aside.<sup>4</sup>

The District Court of Philadelphia have held that the sheriff's handbills should be posted in the most conspicuous situations, and that negative testimony would be received of a non-compliance with this rule; as, that the witness had not seen the advertisements in such places, and that, if there, he must have seen them; and, also, that the names of defendants whose property is to be sold should be inserted in the handbills and papers.

When the lands levied on are unseated and the owner does not reside in the county, the sheriff need not fix the handbill on the premises nor give notice to the defendant, but he must comply with the other requisites of the 62d section of the Act of 1836 above mentioned.<sup>5</sup>

Besides the handbills the officer is also required to give public notice of the sale by advertisement, describing the real estate to be sold, and the time and place of sale, in at least two newspapers, one in the English language, and the other (except in Philadelphia) in the German, if there are any such printed in the county, or if no newspaper is printed in the county, then in the newspaper printed nearest thereto, once a week for three successive weeks previous to the sale; under penalty of fifty dollars to the party aggrieved by his neglect so to do, to be recovered like other debts of like amount. Provided that this is not to debar any party aggrieved from recovering the damages which he may actually sustain by reason of such neglect.<sup>6</sup> But such advertisement is not to be made in two newspapers published in the same office, or by the same man, or company of men;<sup>7</sup> this, however, does not apply to Dauphin,<sup>8</sup> or Montgomery<sup>9</sup> counties. There need not be three weeks between the first adver-

<sup>1</sup> Dale v. Medcalf, 9 Barr 108.

<sup>2</sup> Act 16th June 1836, § 62, Purd. Dig. 442, pl. 72, Pamph. L. 772.

<sup>3</sup> Lane v. Gray, Dunlop's Dig. 737; Clark v. Chambers, Pittsburgh L. J., 31st March 1855.

<sup>4</sup> Rinehart v. Tiernan, D. C. Phila., Dec. 1836, MS.

<sup>5</sup> Act 14th April 1840, § 8, Purd.

Dig. 442, pl. 73, Pamph. L. 352.

<sup>6</sup> Act 16th June 1836, § 63, Purd. Dig. 442, pl. 74, Pamph. L. 772.

<sup>7</sup> Act 22d April 1846, § 2, Purd.

Dig. 442, pl. 75, Pamph. L. 476.

<sup>8</sup> Act 19th April 1864, § 1, Purd.

Dig. 1335, pl. 1, Pamph. L. 494.

<sup>9</sup> Act 27th April 1864, § 1, Purd. Dig. 1335, pl. 2, Pamph. L. 643.

tisement and the day of sale: it is sufficient that the sale is advertised once in every week of three weeks preceding the sale.<sup>1</sup> In

<sup>1</sup> Williams v. Moore, D. C. Phila., May 26th 1849, overruling Francis v. Norris, 2 Miles 150. Why sheriff's sale should not be set aside. *Per curiam*. If the proceedings have been regular, we do not think that there has been any such inadequacy of price established as would justify us in interfering to set aside this sale.

It is objected, however, that the law has not been complied with in regard to the advertisement of the sale. The 62d section of the Act of June 16th 1836, *Purd. Dig.* 442, provides, that before any sale of real estate shall be made, the officer shall cause so many handbills to be made, &c., "which notice shall be given to the defendant, and one of the said papers or parchments shall be fixed by the sheriff or other officer upon the premises; and the others of them in the most public places of the county or city, *at least ten days before such sale.*" The 63d section then provides, that "the officer shall also give notice of every such sale by advertisement, describing the real estate to be sold, and the time and place of sale as aforesaid, in at least two newspapers, one in the English, and the other (except in the city and county of Philadelphia) in the German language, if such there are printed in the county where such real estate may be: or if there be no newspaper printed in such county, then in the newspaper printed nearest thereto, *once a week, during three successive weeks previous to such sale,* under penalty of fifty dollars to the party aggrieved by any such neglect, &c." In the case before us, as the one of the newspaper, and as the organ of publication, the first advertisement was inserted on Saturday, April 21st; the second on Monday, April 23d; the third on Monday, April 30th; and a fourth on Monday, May 7th, which was the day on which the sale took place. It is said that the law requires that three full weeks should elapse from the date of the first advertisement to the day of sale; here, however, there were but seventeen days, both inclusive.

It is evident that the 62d section was that which was intended to provide for the extent of the notice, "at least ten days before such sale." The provision therein made for "so many written or printed handbills, upon parchment or good paper, as the debtor or defendant

shall reasonably request; or so many, without such request, as may be sufficient to give notice of such sale," was by the 4th section of the Act of 1705, and so continued as to this city and county (see Act of March 27th 1824, *Pamph. L.* 119), up to the passage of the Act of June 16th 1836. The 63d section of that act superseded the provision in regard to advertisement; and it is plain, from the old provision in regard to notice to the defendant, "at least ten days before such sale," having been suffered to remain, that the only object of that section was to provide further publicity, and not to extend the time of notice. It enacts, then, under a penalty, that the sale shall be advertised *once a week, during three successive weeks, previous to such sale.* It is not pretended that this requires that the successive advertisements should be at the distance of a week from each other. A week is a definite period of time, commencing on Sunday and ending on Saturday: *Ronkendorff v. Taylor, Lessee*, 4 Peters 361. In the case before us the law has been literally complied with. There was an advertisement on some day of the three weeks which preceded the sale. It is difficult to perceive any warrant in the words or spirit of the act, for the idea that "the advertisement, 'once a week,' has relation to the full expiration of the whole week, from the date of the first advertisement, and so as to the remaining three weeks."

It is only necessary to advert to the fact, that in many, if not most of the counties, there are two or more newspapers published weekly on different days; and as the argument, if good at all, must hold good as to each of the newspapers in which the publication takes place, the result is, that more than three weeks must often elapse before the terms of the law could be complied with. If, for example, in the case before us, the newspaper used had been published on Saturdays and Mondays, and the first publication had been made on April 21st, the sale could not have taken place before Monday, May 14th, twenty-four days from the first publication: and cases might be supposed in which a still longer period must elapse.

It has been decided in *Stoevers Appeal*, 3 W. & S. 157, that the advertise-

Philadelphia the sheriff is required to publish an abstract of his advertisements in the *Legal Intelligencer*. But this abstract cannot be expected to afford all the details of a sheriff's handbill.<sup>1</sup> In Luzerne the courts may designate by rule of court, one weekly legal publication in which shall be published an abstract of all legal notices of which publication is required;<sup>2</sup> or plaintiff's attorney may designate two newspapers published at the county seat by endorsement upon the *præcipe*, which the prothonotary must endorse on the writ, in which advertisement of the sale is to be made.<sup>3</sup> In Franklin publication is to be made in two weekly newspapers having the largest circulation in the county.<sup>4</sup> In Berks, Northampton, Lehigh, Lancaster, Schuylkill, Lebanon, Bucks, Montgomery, and York, the courts may designate by general rule or special order the paper or papers in which publication is to be made, and they may select a German paper.<sup>5</sup> In Susquehanna the plaintiff's attorney as in Luzerne may designate two newspapers in which the sale is to be advertised, but he is not confined to those published at the county seat; if he does not so designate the sheriff may advertise as heretofore.<sup>6</sup>

Precision is required in describing the property and its appurtenances, and the advertisement should specially mention any peculiarity which may be calculated to promote an advantageous sale. Where, therefore, a house and kitchen erected on the lot were not mentioned in the advertisement, the sale was set aside: and it is not enough that the buildings were proclaimed at the time of sale, because by the omission many persons may have been prevented from attending.<sup>7</sup> So the omission to state that the premises were an established tavern stand, and the house and out-houses calculated for a house of public entertainment, coupled with an omission to

ment provided by law to be made by an executor or administrator, for successive weeks, need be made only in so many consecutive weeks.

The case of *Bachelor v. Bachelor*, 1 Mass. 256, is a case in point. There an order was made by the court that a certain notice should be published in a newspaper specified, "*three weeks successively*." The notice was inserted in the paper pointed out (it happened to be a paper which was issued from the press twice weekly), first in the paper of Saturday, June 30th; secondly, Saturday, July 7th; and thirdly, Wednesday, July 11th. And it was held that the order had been substantially complied with.

The case of *Francis v. Norris*, heretofore decided by this court, and reported 2 Miles 150, is, undoubtedly, opposite to this conclusion. It is within the recollection of one of this court, and who was also a member of the court at the time that decision was made, that it was decided, in the course of the current

business of a Saturday, by two only of the court. Although unwilling to overrule precedents, yet we are of opinion that in cases of this nature, where sound interpretation of the statute, as well as the policy of affording greater facility to the collection of debts, are concurrent, that a hasty decision of this nature, which only regulates the practice, without any effect upon titles, ought not to outweigh such considerations as have been presented. R. D.

<sup>1</sup> *Building Ass. v. Silvy*, D. C. Phila., 4 Phila. 17.

<sup>2</sup> Act 12th Feb. 1863, § 1, Pamph. L. 28.

<sup>3</sup> Act 18th April 1861, § 1, Pamph. L. 405.

<sup>4</sup> Act 15th April 1863, § 1, Pamph. L. 469.

<sup>5</sup> Act 22d April 1863, § 1, Pamph. L. 556.

<sup>6</sup> Act 14th April 1863, § 1, Pamph. L. 198.

<sup>7</sup> *Passmore v. Gordon*, 1 Browne 320.

state the name of the village, in a large district, where the premises were situated, will be ground for setting aside the sale.<sup>1</sup> So the right to use an alley should be mentioned.<sup>2</sup> Notice of an intended

<sup>1</sup> *Whitacre v. Pratt*, D. C. Phila., Saturday, Sept. 16th 1848, 1 Am. L. J. 190. Rule to set aside a sheriff's sale. *Per curiam*. We think the description in this case defective. The fact that the premises were an established tavern-stand, and the house and out-houses calculated for a house of public entertainment, ought to have been stated, although we do not mean to say that, if the description is in other respects sufficiently certain, we would set aside a sale on that ground alone, unless indeed accompanied with gross inadequacy of price. Here, however, the premises were situated in a village, the names of the streets in which were given, but not the name of the village; so that a knowledge of the situation of the premises would necessarily be confined to those readers of the description who knew that there were streets of that name in the village of Bridesburg, and none other such in the large district incorporated or unincorporated, popularly and legally perhaps called the Northern Liberties. We are to look at substance in matters of this kind, and not make our judgment to depend on questions of legal nicety, such as whether the village of Bridesburg, not being incorporated, has any legal existence, or whether the rest of the Northern Liberties, except that which is an incorporated district, is properly to be called the unincorporated Northern Liberties, or simply the Northern Liberties. As to the defendant's having acquiesced in the first advertisement, that argument might avail in the mouth of the plaintiff, who has been delayed, and, it may be, injured, but the purchaser is in the same situation as if this were the first sale.

We take occasion to say that the court has never changed the principle upon which it acts in cases in which there appears to be inadequacy of price. It is not of itself any ground; but where it is very gross the court will take advantage of any irregularity in the proceedings, however slight, to set the sale aside. Where there is inadequacy, but not very gross, the court requires security that advance will be bid at a second sale. In other words, where a doubt may be suggested as to the inadequacy, the offer of security that the

property will bring a certain, much larger sum, will have decisive weight with the court in determining the question. We say this in explanation of the case of *Perceval v. Bryant*, 7 Law Jour. 196, the circumstances of which are not remembered, but by the affidavit on which the rule in that case was granted several irregularities are alleged, and certainly the court did not mean to hold that mere inadequacy of price, where the proceedings have been all strictly regular, is of itself a sufficient ground to set aside a sale, even when a higher bid is offered to be secured. Rule absolute.

*Hall v. Mayer*, D. C., Saturday, Sept. 30th 1848. Why sheriff's sale should not be set aside. *Per curiam*. This was a sale under a *levari facias*, upon proceedings upon a mortgage, and one ground upon which the sale is asked to be set aside is that no notice was given to the defendant, as required by the fourth sect. of the Act of 1705 (Purd. Dig. 291, note). That is the only Act of Assembly in force regulating executions upon judgments on mortgages, and it certainly expressly provides for notice to the defendant. The sheriff, however, is presumed to have done his duty, and without meaning to decide anything in regard to the point of notice in this case, as there is another sufficient reason for setting the sale aside, we may be permitted to remark that we have before us no affidavit of defendant that he did not receive notice, which would at least seem to be essential to authorize the court to set aside the sale on this ground.

It appears, however, that the premises had been fitted up at a very considerable expense as a tavern. We think this was an improvement, which ought to have been stated. Rule absolute.

<sup>2</sup> *Ulrich v. McCann*, D. C. Phila., Saturday, April 27th 1850. Rule to set aside sheriff's sale. *Per curiam*. Wherever the price is inadequate, the court will lay hold of any circumstance of irregularity to set aside the sale. In this case, however, it is unnecessary to invoke this principle. It appears upon the evidence before us that the lot No. 2 has a common right to an alley not mentioned in the advertisement, an important circumstance, which would

subdivision of the land should be given in the handbills, and should not be reserved until the time of sale.<sup>1</sup>

But it is not necessary to describe the back buildings, that is, the kitchen and offices annexed to the dwelling.<sup>2</sup>

So a mistake in the amount of an encumbrance is ground for setting aside the sale; as stating the ground-rent, to which the property is subject, too high, whereby it is sold at an under value, although the mistake was rectified at the sale.<sup>3</sup> But the omission to mention that the ground-rent was irredeemable, is not ground for setting aside the sale, where there was a reference to the deed in which the ground-rent was fully described.<sup>4</sup>

If the land be sufficiently described in the advertisement, though not in the levy, the court will not set the sale aside.<sup>5</sup> When there is a misdescription in the advertisement, though the sheriff's handbills described the property correctly, and there is evidence of inadequacy of price, the court will set the sale aside.<sup>6</sup> But where the description in the handbill was correct, but the description in the abstract published in the Legal Intelligencer was defective, the court refused to set the sale aside on the application of the purchaser.<sup>7</sup>

The sheriff's advertisements are but extrinsic preliminary matters, which have no bearing on the title after the deed is acknowledged.<sup>8</sup>

weigh in setting aside any sale. *R. A. Chadwick v. Patterson*, D. C. Phila., 2 Phila. Rep. 275; *Carlin v. Leng*, C. P. Phila., 1 Phila. Rep. 375.

<sup>1</sup> *Newman v. Callagan*, D. C. Phila., *post*, p. 1002, note 1.

<sup>2</sup> *Steinmetz v. Stokes*, D. C. Phila. Saturday, Oct. 14th 1848. Why sheriff's sale should not be set aside. *Per curiam*. It is objected that the sheriff's bill did not describe the back buildings—that is, not independent improvements on the rear of the lot, but the usual necessary offices of every dwelling, as kitchen, bath-house, privy, &c. Such particularity has never been required.

Again, it is said, that the bill does not state that the ground-rent, to which the property is subject, is redeemable. It gives the date of the ground-rent deed, however; and this was enough to put every one upon inquiry, as to the nature and character of the charge.

And, lastly, we are by no means satisfied, by the evidence, that there is any inadequacy of price. We have no evidence as to the value. To prove that somebody had offered to give a certain sum without producing that person, is manifestly nothing but that person's declaration, not under oath, of his opinion as to its value. The remark has no application to this case from

anything that appears; but it is clear to be seen how easy such evidence could be manufactured; and this is the only evidence we have before us. Rule dismissed.

*Gilbert v. Jackson*, Saturday, Sept. 7th 1850. Rule to set aside sheriff's sale. *Per curiam*. This is an application to set aside a sheriff's sale on the ground of misdescription. The alleged error is in not particularly describing the kitchen and back-buildings attached to the dwelling-house and used with it. Although all material improvements must be set forth, the sheriff ought not to go into a full description of them like in an auctioneer's puff. It is enough that the buildings and improvements are mentioned. Bidders can inquire and ascertain their extent and character. We have always decided that it was not necessary particularly to mention and describe kitchens. They are a part of the dwelling-house which here is mentioned. *R. D.*

<sup>3</sup> *Wells v. Pfeiffer*, 4 Yeates 203.

<sup>4</sup> *Steinmetz v. Stokes*, *supra*.

<sup>5</sup> *Dunlap v. Gray*, D. C. Alleg., *Lowrie*, J.

<sup>6</sup> *Kenderdine v. McClintock*, D. C. Phila., 2 Phila. Rep. 224.

<sup>7</sup> *Building Ass. v. Silvy*, D. C. Phila., 4 Phila. Rep. 17.

<sup>8</sup> *Heartley v. Beaum*, 2 Barr 172.

*Manner of sale.*—The property is to be sold, at the time and place appointed, by auction to the *highest and best* bidder. Therefore if the highest bidder is unable to pay, the sheriff may make an offer to the next highest bidder. If a purchaser forfeit his pretensions as the highest bidder, the sheriff may refuse giving him a deed at his own risk, and the merits of the purchaser's case may be ascertained in an action by him against the sheriff.<sup>1</sup> In Philadelphia county, the sheriff is liable to be imposed upon by persons unknown to him, who occasionally contract to purchase at his sales of real estate with no other intent than to get time for the defendant, or to speculate on the property within the ten days: frequent defeats of sheriff's sales are thus produced, and to guard against them he now requires in all cases an advance of a certain portion of the purchase-money as earnest; if it be refused, he puts up the property again or offers it to the next highest bidder. The payment in such cases is not to be construed as a penalty for, but as a pledge to prevent, the failure of the purchaser to comply.<sup>2</sup>

A bidder has a right to retract his bid before the property is struck off to him, and the sheriff has no right to prescribe conditions which deprive him of such right.<sup>3</sup> And when the sale is adjourned after a bid has been made, the bid is withdrawn by implication.<sup>4</sup> But where the plaintiff was the highest bidder, and the sale was adjourned at his instance, it was held that he could not withdraw his bid and purchase the property at a lower price.<sup>5</sup>

The sheriff is not bound to regard a conditional bid, or an absolute one which is merged in one conditional and not subsequently revived.<sup>6</sup>

When the sheriff has established a rule in regard to the order of selling he cannot deviate from it: therefore it being the custom in Philadelphia to sell the properties according to the alphabetical order of the initials of the names of the counsel who have issued the writs, beginning the sales one month at the letter Z and the next month at the letter A, and the sheriff sold under the letter W, a property which was arranged in the advertisement, and would regularly have been sold, under the letter S, whereby it sold for much less than a person in the room was prepared to bid, the court set aside the sale.<sup>7</sup> Where more than one property is described in the bill, the sheriff must put up each particular property after reading the description of it.<sup>8</sup> And it has been intimated that he should read the names of the parties whose property has been seized, as well as the description, in order that agents of those concerned may know when the sale is commenced from the one circumstance if not from the other.<sup>9</sup>

<sup>1</sup> *Vastine v. Fury*, 2 S. & R. 435.  
See *Auwerter v. Mathiot*, 9 S. & R. 397: *Weidler v. Farmers' Bank of Lancaster*, 11 S. & R. 134.

<sup>2</sup> *Forster v. Hayman*, 2 Casey 266.

<sup>3</sup> *Fisher v. Seltzer*, 11 Harris 308.

<sup>4</sup> *Donaldson v. Kerr*, 6 Barr 486.

<sup>5</sup> *Vanernan v. Cooper*, D. C. All., 2 Am. L. J. 265.

<sup>6</sup> *Farmer v. Sedgwick*, S. Ct., 1 Am. L. J. 154.

<sup>7</sup> *Sergeant v. Goslin*, C. P. Phila., 1 Phila. Rep. 301.

<sup>8</sup> *Hanscom v. Henderson*, D. C. Phila., 1 Phila. Rep. 576.

<sup>9</sup> *Garret v. Shaw*, D. C. Phila., Ven. Ex., June Term 1830.



*Should not be in a lump.*—Upon a sheriff's sale of real property, the general rule prescribed by public utility is, that different lots of ground, houses, and parcels of land, should be sold separately; as many persons might purchase *one*, who could not buy *several* houses; and bidders, by selling all together, would be discouraged, to the public injury. It is essential to the protection of unfortunate debtors, that lumping sales should be disallowed where distinct ones can be effected. Thus, if there be a lot of ground, out of which an entire ground-rent is payable, with three tenements on it, but so divided that a portion of it is used with each tenement, it must be sold in three distinct parcels, otherwise the sale will be set aside. So, in all cases in violation of this general rule, unless the sheriff satisfies the court that they form clear exceptions to it.<sup>1</sup> This rule will not obtain, however, where the property is from its nature incapable of partition; but only where distinct pieces can conveniently be sold separately. Thus, a sale of two undivided third parts of three contiguous houses on one lot was confirmed, as few persons would choose to purchase an undivided interest in a house incapable of division.<sup>2</sup> So, distinct tenements on one entire farm, occupied by different persons, must follow the principal estate, and be sold as parcel of it. So if, after judgment, the defendant sells part of the land and separates the tract by an ideal line, the sheriff may sell the whole.<sup>3</sup> The sheriff ought not to sell more of the property than will probably satisfy the execution, and which can conveniently and reasonably be sold separately;<sup>4</sup> and he cannot sell more than he has actually levied upon.<sup>5</sup>

And a common encumbrance, or a common privilege, is no reason for selling them together.<sup>6</sup>

Where the sheriff sells different parcels or houses together, the court will set the sale aside without requiring it to appear that the price was inadequate.<sup>7</sup> But where two lots have been improved, and used for a single purpose, the fact that they were acquired at different times, and subject to unequal ground-rents, will not induce the court to set aside a sale of them as one property.<sup>8</sup>

<sup>1</sup> Ryerson v. Nicholson, 2 Yeates 517; Vastine v. Fury, 2 S & R. 434; Rowley v. Brown, 1 Binn. 62.

<sup>2</sup> Prior v. Britton, 2 Yeates 550.

<sup>3</sup> Dickey's Case, C. P., 1 Journ. Juris. 91.

<sup>4</sup> 8 Johns. 333.

<sup>5</sup> Rodgers v. Gibson, 4 Yeates 111.

<sup>6</sup> Tate v. Carberry, D. C. Phila., 1 Phila. Rep. 133.

<sup>7</sup> Connell v. Hughes, D. C. Phila., 1 Phila. Rep. 225.

<sup>8</sup> Biddle v. Rudolph, D. C. Phila., April 29th 1848. Why sheriff's sale should not be set aside. *Per curiam*. The sole ground alleged in support of this motion is that the two properties described in the handbill acquired at different times, subject to unequal ground-rents, have been sold together.

It is very evident, however, that the two lots in question have been improved and used for one single purpose; that of a livery stable with the usual appurtenances for such a purpose. It is clear also that the sale of it in two separate lots would destroy its use and value for the purpose to which it is now appropriated. It may be that a division would be better, with a view to its future improvement, in a different way. But is a plaintiff to enter into these calculations and conjectures? It is the settled principle upon which the court acts in cases of this kind, that the plaintiff is to look at the actual state of the premises, and no further. Who can doubt that, if the sale had been in separate parcels, and the value of the present improvements had thus

Where a subdivision of property about to be sold at sheriff's sale is necessary, the proper course, in case the parties cannot agree among themselves as to a plan, is for an application to be made to the court whence the execution issues, which, on sufficient cause being shown, will order the manner in which the property is to be divided; but notice of an intended subdivision should be given in the handbills, not postponed until the time of sale.<sup>1</sup> It is always a reasonable precaution to call upon the defendant or terre-tenant before the sale, and ask him to propose a plan for selling the houses otherwise than together;<sup>2</sup> or notify him of the intended subdivision, and if he refuse to furnish any other as more satisfactory, it must be a very strong and peculiar case in which the court would interfere to set aside the sale.<sup>3</sup>

A single sale of the same property under two writs against different defendants is irregular and invalid; it should be sold under each writ separately, or under one of them only.<sup>4</sup>

Though a leasehold estate is a chattel real, yet it resembles a freehold in this, that it need not be sold on the premises.<sup>5</sup>

*Conditions.*—The sheriff is bound by the statute to sell the debtor's interest, whatever it may be, without terms or conditions

been destroyed, the proceeding, if the result had been unsatisfactory to any party except the plaintiff, would have been set aside? Creditors are entitled to receive their debts, without unnecessary delay; and if they have done nothing but what was clearly right and the proceedings have been perfectly regular, on what principle can the court interfere? As to the fact that the titles of the two lots were different and the ground-rents unequal, that can make no difference. We have often decided that separate lots, though derived from the same common source of title and subject to one paramount ground-rent, more than the value of each particular lot and its improvement must still be sold separately; thus throwing upon the purchaser the risk and trouble, after being obliged to pay the whole paramount ground-rent, of seeking contribution from the owners of the other parcels. This is a much stronger case than its converse, which is now before us. Our discretion in cases of this kind is a legal discretion, not to be exercised at random, according to mere whim or caprice, but according to settled principles and rules.

Rule dismissed.

<sup>1</sup> *Newman v. Callahan*, D. C. Phila. Saturday, April 22d 1848. Why sheriff's sale should not be set aside. *Per curiam*. Whenever a lot is sold, in separate parcels, we think the subdivisions in which it is to be sold should appear

in the handbills and advertisements, in order that bidders may have the opportunity to examine and decide beforehand what sum to offer for each parcel. Cautious men would hesitate to make up their minds during the hurry of the sale; and probably decline bidding altogether.

No doubt, a creditor has no right to cut up an entire lot according to his own pleasure. If there are the marks of an actual division on the ground, he should follow that. In this case there were three distinct tenements, though two of them were dilapidated and uninhabitable. Yet the lot was sold in two parts of very unequal size. The brick building was sold by itself, not including a passage and watercourse by the side of it in actual use with it. In practice, it is the safer course, where there is any doubt, to notify the defendant, or terre-tenants, of the subdivision intended to be made, and if they refuse to furnish any other 'as more satisfactory, it must be a very strong and peculiar case in which the court would interfere to set aside the sale.

Rule absolute.

<sup>2</sup> *Tate v. Carberry*, D. C. Phila., 1 Phila. Rep. 133.

<sup>3</sup> *Newman v. Callahan*, *supra*.

<sup>4</sup> *Building Ass. v. Henry*, D. C. Phila., 3 Phila. Rep. 34; s. c., 15 Leg. Int. 28.

<sup>5</sup> *Sowers v. Vie*, 2 Harris 99.

affecting the title; and as the law prescribes the conditions of sale, a departure from them by the sheriff is invalid, and hence he cannot ordinarily stipulate the continuance of a lien which the law decrees to be divested by the sale, or *vice versa*, and an attempt to do so, will not ordinarily bind the parties in interest.<sup>1</sup> Thus, where the owner of the prior mortgage became the purchaser at a sheriff's sale, under a junior encumbrance, he is not entitled, in the absence of stipulations inserted in the conditions of sale, to a deed from the sheriff, on offering to credit the amount of his bid in satisfaction of his mortgage.<sup>2</sup> And a sale will be set aside where by the plaintiff's direction it was made subject to prior liens.<sup>3</sup> Where a mortgage existed on the premises which the sale would not discharge, and the sheriff declared that the purchaser would not have to pay more than the amount of his bid, it was held that the purchaser's remedy was by application to the court to relieve him at the return of the writ, but he could not set up this defence in a suit on his bond for the purchase-money.<sup>4</sup> And where the purchaser is seriously misled by the representations of the sheriff as to the amount of encumbrances against the property, the court will set aside the sale.<sup>5</sup>

But land may be sold subject to a mortgage, although it is not the first encumbrance, if it be so understood and agreed to by the purchaser at the time of the sale.<sup>6</sup> And where the sheriff's vendee had expressly agreed to purchase subject to the lien of a mortgage, and the court accordingly decreed the proceeds of the sale to other and subsequent liens, one who afterwards purchases from the sheriff's vendee is concluded by the decree, and holds the land subject to the mortgage.<sup>7</sup> So where the conditions defining the liens to which a sale was subject were in writing, and were expressed in the sheriff's deed, the court will not relieve the purchaser from any part of his bid, but will enforce the contract of sale.<sup>8</sup> But a parol agreement at the time of the sale that certain liens, which by law would be discharged, shall not be so discharged, may be binding on those who make it, but it will have no validity against those who are not parties to it, and will have no effect against a subsequent purchaser or encumbrancer.<sup>9</sup> And it is not in the power of the sheriff by prescribing terms of sale to affect the right of lien-creditors to the proceeds; he is the mere agent of the law in effecting the sale.<sup>10</sup> And in one case the court rebuked the sheriff for selling land subject to the widow's dower, as if the law were incomm-

<sup>1</sup> Mather v. McMichael, 1 Harris 305, per BELL, J. See Reigle v. Seiger, 2 Pa. R. 340; Hellman v. Hellman, 4 Rawle 440; Mode's Appeal, 6 W. & S. 280; Randolph's Appeal, 5 Barr 342; Wood v. Lewis, 2 Harris 9.

<sup>2</sup> Crawford v. Boyer, 2 Harris 383.

<sup>3</sup> Dunlap v. Gray, D. C. All., LOWRIE, J.

<sup>4</sup> Wood v. Lewis, 2 Harris 9.

<sup>5</sup> Finley's Executor v. McCulley's Administrator, D. C. All., 2 Phila. Rep. 212.

<sup>6</sup> Schultze v. Diehl, 2 Pa. R. 277. See Luce v. Snively, 4 Watts 397; Tower's Appropriation, 9 W. & S. 103; Ziegler's Appeal, 11 Casey 173.

<sup>7</sup> Towers v. Tuscarora Academy, 8 Barr 297.

<sup>8</sup> Schall's Appeal, 4 Wright 170.

<sup>9</sup> Loomis's Appeal, 10 Harris 312. And mere notices or loose declarations by persons present at the sale that the sale would be subject to certain liens, are of no effect: Ibid.

<sup>10</sup> Devine's Appeal, 6 Casey 348.

petent to protect her interests without his aid.<sup>1</sup> So he is bound to sell the debtor's whole interest in the land, and can lawfully reserve nothing for him, either in the land or the price of it.<sup>2</sup> And it is no part of his duty to examine and know the state of any encumbrances besides that under which he sells: whether or not it will discharge the property from other liens, the rule *caveat emptor* fully applies to all such sales.<sup>3</sup>

The sale is always for cash, unless other conditions are specified.<sup>4</sup>

*Notices at the sale.*—Notice of an unrecorded conveyance given at the sale will affect a purchaser.<sup>5</sup> But the holder of a mortgage not recorded or illegally recorded, cannot, by giving notice of its existence at a sale under a subsequent judgment, bind the purchaser where the judgment-creditor had no notice of the mortgage at the time when his judgment was entered; and what would be the effect of the notice if the judgment-creditor had had notice, before his judgment was entered, of the existence of the mortgage, was doubted.<sup>6</sup> It has, however, since been held that if the purchaser, who was plaintiff in the execution, had actual notice, prior to the entry of his judgment, of the existence of the mortgage, he is bound by a notice given at the sale.<sup>7</sup> A tenant in common of defendant, whose deed is on record, and who, being present at the sale, causes notice to be given that it is only the defendant's interest which is being sold, is not estopped from asserting his title against the purchaser.<sup>8</sup> And whatever puts a party on inquiry amounts to notice, provided the inquiry becomes a duty (as it always is with a purchaser), and would lead to the discovery of the requisite fact by the exercise of ordinary diligence and understanding.<sup>9</sup> So where the defendant was tenant in fee simple of two-thirds of the land, and tenant for life, in right of his wife, of the other third, the wife was not concluded by omission to give notice of her title at the sale, where the defendant's title was within reach of the purchaser, and the wife was not shown to be aware of the sale.<sup>10</sup> Where the purchaser is acquainted with an adverse claim of title it is not the duty of the claimant to proclaim the same at the sale.<sup>11</sup> A notice given at the sale, by a stranger to the writ, that he claims absolute title in the land, precludes him from setting up any other title against the purchaser.<sup>12</sup> So a person representing at the sale that a certain judgment was paid, is bound by such statement, if incorrect and injurious, though he was not then the owner of the judgment but purchased it afterwards.<sup>13</sup> But a mere notice or loose declarations

<sup>1</sup> *Aulenbaugh v. Umbehauer*, 8 Watts 49, 50.

<sup>2</sup> *Ibid.* s. c., 3 W. & S. 259; *Reigle v. Seiger*, 2 Pa. R. 340; *Fretz v. Heller*, 2 W. & S. 399.

<sup>3</sup> *Carson's Sale*, 6 Watts 140.

<sup>4</sup> *Negley v. Stewart*, 10 S. & R. 207.

<sup>5</sup> *Moyer v. Schick*, 3 Barr 242.

<sup>6</sup> *Uhler v. Hutchinson*, 11 Harris 110, overruling *Solms v. McCulloch*, 5 Barr 473.

<sup>7</sup> *Stradling v. Henck*, D. C. Phila., 2 Phila. Rep. 302.

<sup>8</sup> *Hill v. Epley*, 7 Casey 331, overruling *Epley v. Witherow*, 7 Watts 163.

<sup>9</sup> *Barnes v. McClinton*, 3 Pa. R. 67; *Weeks v. Haas*, 3 W. & S. 525; *Hill v. Epley*, 7 Casey 331.

<sup>10</sup> *Beal v. Stehley*, 9 Harris 376.

<sup>11</sup> *Owens v. Meyers*, 8 Harris 134.

<sup>12</sup> *Eshbach v. Zimmerman*, 2 Barr 313.

<sup>13</sup> *Bitting & Waterman's Appeal*, 5 Harris 211.

by persons present that the sale would be subject to certain liens is of no effect.<sup>1</sup> The sheriff is not the agent of the purchaser, and consequently notice to him is not notice to the purchaser.<sup>2</sup> But notice to counsel is presumptive notice to the client.<sup>3</sup>

When the judgment was confessed by an attorney without authority, the giving notice at the sale of such defect amounts only to notice that the defendant then knew of the defect, but had taken no proper measures to arrest the proceedings.<sup>4</sup>

The plaintiff may stay the *vend. exp.* even at the sale, and a purchaser having notice of such stay is bound by it: thus, where two writs of *vend. exp.* issued, one for part of a mortgage-debt, and the other on a subsequent judgment unconnected with the mortgage; and at the sale, the counsel having charge of the first writ gave public notice to the effect that the property was selling subject to the mortgage, and the sheriff returned the property sold on the latter writ, the purchaser, who was present when the notice was given, took the property subject to the mortgage.<sup>5</sup> The effect of notice upon the rights of purchasers is discussed elsewhere.<sup>6</sup>

Written notice, put up at the place of sheriff's sale, may be proved by parol, without the production of the paper.<sup>7</sup>

*Who may be purchaser.*—Lien-creditors may purchase jointly at sheriff's sale, if all be open and fair; and if their combination tend to raise and not to depress the price.<sup>8</sup> But the purchase of lands on behalf of a client who is a lien-creditor, or plaintiff in the execution, is not within the trust confided to an attorney, and he is not entitled to a deed from the sheriff without paying the purchase-money, or giving a receipt on behalf of his principal: a receipt, provided there were no collusion, would justify the sheriff in giving a deed: but if the plaintiff himself should apply to the court before the deed is acknowledged, and insist on payment of the money, the court would suspend the acknowledgment until the money was paid, or set aside the sale if it were not paid in a short time.<sup>9</sup> And an attorney cannot purchase for his own benefit, to the prejudice of his client, for a less sum than the amount of the claim upon which the land was being sold; and if there be two plaintiffs in the execution he cannot purchase for the benefit of one without the consent of the other, for a less sum than the whole amount of the claim; and if he do so purchase, and the sheriff make a deed to one of the plaintiffs, under such circumstances there is a resulting trust for both.<sup>10</sup> But memoranda on the margin of the record, naming the attorney in the case, are not a part of the record so as to charge the grantee of such attorney, who was the purchaser at sheriff's sale under the

<sup>1</sup> Fickes v. Ersick, 2 Rawle 166; Drexel v. Man, 6 W. & S. 343; Loomis's Appeal, 10 Harris 312.

<sup>2</sup> Stahle v. Spohn, 8 S. & R. 317.

<sup>3</sup> Barnes v. McClinton, 3 Pa. R. 67.

<sup>4</sup> Cyphert v. McClune, 10 Harris 195.

The remedy is against the attorney, or by timely application to the court to open the judgment: Ibid.

<sup>5</sup> Shryock v. Jones, 10 Harris 303.

<sup>6</sup> See post, "Purchaser's Title."

<sup>7</sup> Weeks v. Haas, 3 S. & R. 520. See Whitesell v. Crane, 8 W. & S. 369.

<sup>8</sup> Smull v. Jones, 1 W. & S. 136; Same v. Same, 6 W. & S. 122.

<sup>9</sup> Pearson v. Morrison, 2 S. & R. 21.

<sup>10</sup> Galbraith v. Elder, 8 Watts 93, KENNEDY, J. So Leisenring v. Black, 5 Watts 303.

judgment, with notice that his grantor was the attorney of the plaintiff, and therefore purchased at the sheriff's sale in trust for the plaintiff.<sup>1</sup>

The prohibition against attorneys purchasing for themselves at sales under the judgments of their clients, is somewhat akin to the general rule which prohibits a trustee from purchasing for his own use the property towards which he stands in a fiduciary relation. Thus an administrator, purchasing at sheriff's sale, and settling the purchase-money by using bonds belonging to the estate which were a lien on the land sold, no money being paid, becomes a trustee for the heirs of the deceased.<sup>2</sup> But the rule does not apply where the sale is made by a public officer under proceedings adverse to the interest of the *cestui que trust*, and the trustee has not the means in his power to prevent the sale; therefore a guardian, without funds in his hands, may lawfully become the purchaser for his own use, of his ward's real estate sold by the sheriff under a judgment against the ward's ancestor.<sup>3</sup> Yet, a sheriff's sale to the administrator of defendant, who paid no money, but purchased in trust for the creditors and heirs, is fraudulent as to creditors.<sup>4</sup>

The plaintiff in the execution may of course purchase. But where the judgment was confessed by an insolvent debtor, though the presumption of law is in favor of fairness if the judgment itself is fair, yet the burden of showing this rests on the creditor purchaser.<sup>5</sup>

A joint debtor in the judgment may purchase at the sale of his co-defendant's land, if with his own means and for his own use.<sup>6</sup>

As between the defendant or his representatives, and the sheriff, a purchase by the latter or any one in trust for him is void, it being against public policy that the same person should be both seller and purchaser. But if the defendant consents his representatives cannot impeach the sale; and if he does not know or consent, the sale will not be disturbed to the prejudice of a subsequent *bona fide* purchaser, without notice.<sup>7</sup> Where there is no fraud the defendant may disaffirm such sale, but must pay the money back.<sup>8</sup>

*Misconduct on the part of purchaser.*—If the purchaser possess a knowledge of facts unknown to others attending the sale, and which if known would have had an influence upon the sale, the court will not permit a deed to him to be acknowledged, but will set the sale aside.<sup>9</sup> If the purchaser gets the property at an under price by a trick or fraudulent pretence, as by falsely giving out that he was buying it for the family of defendant, or by fraudulently pretending that the sale would be subject to certain liens which he knew would be divested by it, his title is invalid.<sup>10</sup> But to have this effect the fraudulent attempt must be successful, for if the land brings a fair price such attempt will not vitiate the title; and on this ques-

<sup>1</sup> Barlow v. Beall, 8 Harris 178.

Binn. 54.

<sup>2</sup> Beck v. Uhrich, 1 Harris 636.

<sup>8</sup> Jackson v. McGinness, 2 Harris 331.

<sup>3</sup> Chorpenning's Appeal, 8 Casey 315.

<sup>4</sup> Hays v. Heidelberg, 9 Barr 203.

<sup>9</sup> Hutchinson v. Moses, 1 Browne 187.

<sup>6</sup> Brandt v. Stevenson, D. C. Phila.,

3 Phila. Rep. 205.

<sup>10</sup> McCaskey v. Graff, 11 Harris 321;

<sup>7</sup> Gibson v. Winslow, 2 Wright 49.

Hogg v. Wilkins, 1 Grant 68; Abbey

<sup>1</sup> Lessee of Lazarus v. Bryson, 3

v. Dewey, 1 Casey 413.

tion evidence of the value of the property is pertinent and proper.<sup>1</sup> If the purchaser has been guilty of actual fraud he is not entitled to be reimbursed what he paid for the property.<sup>2</sup>

But it is not fraud in the plaintiff intending to purchase at the sale, if he does not make known to the bidders the amount of mortgages or encumbrances against it, or whether it is sold subject to or clear of them.<sup>3</sup>

In case of actual fraud, which has resulted in the property selling below its value, the sale may be invalidated even after acknowledgment of the sheriff's deed.<sup>4</sup> Declarations and conversations of the purchaser, calculated to prevent others from bidding, may be given in evidence.<sup>5</sup>

*Agreements between bidders.*—A purchaser may lawfully agree to purchase for the benefit of the defendant, though the representation of that fact made at the sale causes the property to sell for less than it otherwise would have brought.<sup>6</sup> But a promise to purchase for defendant's benefit will not constitute the purchaser a trustee for him unless the purchase was made with the money of the defendant.<sup>7</sup> A promise by a purchaser who buys with his own money, that he will convey to defendant upon the payment of a stipulated price, creates no relation between them but that of vendor and vendee.<sup>8</sup>

A contract between two judgment-creditors, that the profits to be made upon a resale, if the property should be purchased by them, should, after paying their claims, be applied to the payment of the claims of the other creditors, is not in itself fraudulent and without consideration, and may be enforced in the absence of actual fraud in the conduct of the sale.<sup>9</sup> So where there is an agreement between the plaintiff and a third party that the latter, in case the land is bought in by the plaintiff, shall take it from him at a certain fixed price, and the agreement is carried into effect, the amount which is to be applied to the discharge of the judgment, and to be credited to the defendant, is the price agreed to be paid, and not the smaller sum bid at the sale; and this must also be considered the price of the land, not only between the plaintiff and defendant, but as regards all parties interested in the price.<sup>10</sup> Arrangements of this kind, that the land shall be sold by the sheriff, in order to make title, but at a price previously agreed upon between the parties, are not uncommon in practice.<sup>11</sup>

An agreement by a bidder at the sale to pay the judgment of another if the latter would not bid, the former being permitted to purchase the property, is fraudulent as to the debtor or his creditors,

<sup>1</sup> *Abbey v. Dewey*, 1 Casey 413.

<sup>2</sup> *McCaskey v. Graff*, 11 Harris 321; *Sharp v. Long*, 4 Casey 433.

<sup>3</sup> *Carson's Sale*, 6 Watts 140. Nor is it any part of the sheriff's duty to know the encumbrances: *Ibid*.

<sup>4</sup> *Sharp v. Long*, 4 Casey 433.

<sup>5</sup> *Hoffman v. Strohecker*, 9 Watts 183.

<sup>6</sup> *Ibid*. 185.

<sup>7</sup> *Barnet v. Dougherty*, 8 Casey 371.

<sup>8</sup> *Hogg v. Wilkins*, 1 Grant 68.

<sup>9</sup> *Young v. Snyder*, S. Ct., 2 Phila. Rep. 315; s. c., 3 Grant 151.

<sup>10</sup> *Young v. Stone*, 4 W. & S. 45; *Rease v. Crowley*, D. C. Phila., 4 Phila. Rep. 97.

<sup>11</sup> See *Smull v. Jones*, 1 W. & S. 136, *et seq.*, *Gibson*, C. J.

is void, and cannot be enforced by suit.<sup>1</sup> Even if the promise had been valid, an auditor distributing the proceeds could not on that ground disregard the prior lien of the purchaser.<sup>2</sup> Where the sale was void on account of a fraudulent combination between bidders, the defendant may recover the land in ejectment; and *it seems* he is not bound to tender the defendants the amount they have paid.<sup>3</sup>

*Postponing the sale.*—The plaintiff has a right to suspend the sale where it may result in a sacrifice, or where a little indulgence may render a sale unnecessary; and during these proceedings, he retains his lien provided he continues his process in such a manner as to give public notice that he means to hold the land: this may be done by issuing writs of *venditioni exponas*, from term to term, and delivering them to the sheriff.<sup>4</sup>

*Effect of sale as notice.*—A judicial sale of land as the property of one person, will not affect an adverse claimant of the land with notice of the claim of title thereto by the defendant in the judgment, unless actual notice be given.<sup>5</sup>

*Setting aside the sale.*—Where there has been mistake, misconduct, or fraud in the course of the sale, whereby any of the parties thereto is prejudiced, it may generally be corrected on application made to the court by the party aggrieved to set the sale aside. The power of the court in this respect is very great, and is discretionary, as no *appeal* lies from its exercise under the Act of April 26th 1827;<sup>6</sup> nor from their refusal to exercise it.<sup>7</sup> Whether a *writ of error* will lie, or whether the purchaser may, by refusing to take back his money, sustain an ejectment for the land, has been doubted.<sup>8</sup>

As to its own proceedings, the District Court may properly grant the same relief on motion that was formerly granted under the old practice by *audita querela*, writ of error *coram nobis*, or bill in equity.<sup>9</sup> Where the judgment is set aside, the setting aside of the sale follows as a matter of course, on the ground of restitution.<sup>10</sup> A purchaser at a sale made by order of the court in proceedings in partition, if he have any just reason for setting aside the sale, must apply for relief to the court which made the order.<sup>11</sup> The application is by motion supported by affidavits, and in the District Court of Philadelphia, an affidavit is required of service of notice upon all parties who may not have appeared at the taking of depositions, or upon the hearing of the rule.<sup>12</sup> That court on motions to set aside

<sup>1</sup> Slingluff v. Eckel, 12 Harris 472.

<sup>2</sup> Logue's Appeal, 10 Harris 50.

<sup>3</sup> Smull v. Jones, 1 W. & S. 138, GIBSON, C. J.

<sup>4</sup> Cowden v. Brady, 8 S. & R. 507.

<sup>5</sup> Wright v. Wood, 11 Harris 120.

<sup>6</sup> Young's Appeal, 2 Pa. R. 380.

<sup>7</sup> Crawford v. Boyer, 2 Harris 383.

<sup>8</sup> See Young's Appeal, 2 Pa. R. 380.

<sup>9</sup> Stephens v. Stephens, D. C. Alleg.,

1 Phila. Rep. 108.

<sup>10</sup> Ibid.

<sup>11</sup> Allen v. Gault, 3 Casey 473.

<sup>12</sup> Ingersoll v. Sherry, D. C. Phila., Saturday, April 20th 1850; s. c., 1 Phila. Rep. 68. Rule to set aside sheriff's sale. *Per curiam*. It was undoubtedly irregular to set aside the first sheriff's sale without notice to defendant. The court acted on the assurance that all parties had notice.

In all cases hereafter the court will require an affidavit of service upon all parties (to wit: plaintiff, defendant, purchaser, and sheriff) who may not have appeared at the taking of the



the sheriff's sale will not generally determine questions of title; and this rule is based on the fact that in ordinary cases the possession of real property is not necessarily changed—a purchaser being obliged to bring ejectment when the title he has acquired is disputed. When, however, the process of the court is used to produce a summary transfer of the possession, as in the case of an extent, the reason of the rule fails, and the rule fails with it.<sup>1</sup> But the applicant is not confined to matters set out in his affidavit: an objection arising in the course of the examination will be heard, provided the other party has had an opportunity to meet it.<sup>2</sup>

Though it is irregular for the court to set aside the sale without notice having been given to all the parties interested, yet where a sale was set aside without notice to the defendant, who notwithstanding suffered the second sale to proceed without calling, at the time, the attention of the court to the irregularity, the court afterwards refused relief.<sup>3</sup>

*Who may make the application.*—In general, the party (plaintiff, defendant, purchaser, or lien-creditor) who has been aggrieved by mistake, misconduct, or fraud, committed in the course of the sale, may apply to have it set aside. He must be interested in the fund or the land.<sup>4</sup> And he must have a *prima facie* interest at least; and the court will not refuse such application because the interest of the applicant is controverted, for they will not decide his rights in this proceeding.<sup>5</sup> This is the proper remedy for a purchaser who has bid under a misapprehension of his rights.<sup>6</sup> And judgment-creditors may oppose the confirmation of a sale.<sup>7</sup> And a mortgage-creditor who has bid in property improperly described in the advertisements, &c., and has failed to comply with the terms of the sale,

depositions, or upon the hearing of the rule. The defendant here, however, suffered the second sale to go on without coming in and asking the court to rescind its order, and calling their attention to this irregularity. It affords no ground, therefore, to regard his application to set aside the second sale favorably. Apart from this we see no ground to interfere. R. D.

<sup>1</sup> Pray v. Brock, 2 P. L. J. 341.

<sup>2</sup> Chadwick v. Patterson, D. C. Phila., 2 Phila. Rep. 275.

<sup>3</sup> Ingersoll v. Sherry, ante, p. 1008, note 12.

<sup>4</sup> Laird v. Laird, D. C. Lancaster, 3 P. L. J. 474.

<sup>5</sup> Shields v. Kuhn, D. C. Phila., December 1st 1851. Rule to set aside sheriff's sale. *Per curiam*. It is not pretended but there was a flagrant misdescription, affording ample ground for making this rule absolute. But it is alleged that Thomas Sowerman—who makes this application—has no interest, he being a creditor by a judgment, the lien of which has been dis-

charged by a judicial sale. Whether his lien be discharged or not depends, not only upon a question of law of great nicety and importance, which certainly has never been decided in the Supreme Court, but in a certain aspect of the case may depend upon the *bona fides* of a certain deed, which it is alleged by the purchaser who opposes this application to have been fraudulent and void as to creditors; and he has offered to establish this point by depositions. We are clear, however, that upon such a question as this we ought not to assume the decision of such a controversy in a collateral proceeding like this. It is enough to show a *prima facie* case of interest, though it may be controverted, to let in a party to set aside a sheriff's sale; otherwise, indeed, his most important rights and property might be irremediably sacrificed. R. A.

<sup>6</sup> Crawford v. Boyer, 2 Harris 380.

<sup>7</sup> Cash v. Tozer, 1 W. & S. 528. See Watson v. Willard, 9 Barr 89, Shields v. Kuhn, *supra*.

is not thereby estopped from objecting to a second sale made under the same erroneous description.<sup>1</sup>

But the defendant, who has recently been discharged as a bankrupt, is not entitled to make such application.<sup>2</sup>

A stranger who claims by title paramount to that of the defendant, cannot apply to have the levy and sale set aside.<sup>3</sup>

*Time of application.*—Good faith requires that the application to set aside a sheriff's sale should be made at the earliest possible period: it is true that it may be entertained at any time before the acknowledgment of the sheriff's deed; but it is not right that the party should sleep upon his rights while the purchaser is continually incurring expense: therefore, a long delay in making such application which is not accounted for, will be sufficient ground for the court to decline interfering with the sale.<sup>4</sup> A delay of twenty days after the sale has been held unreasonable, and the court declined to interfere.<sup>5</sup> In general, the application must be made before the acknowledgment of the sheriff's deed.<sup>6</sup> But where the judgment is set aside or opened, the setting aside the sale follows as a matter of course on the ground of restitution; and in such case the sale will be set aside after the acknowledgment, and the lapse of a term, if the deed be still in the sheriff's hands.<sup>7</sup> So the sale will be set aside, even after the acknowledgment of the sheriff's deed, where the plaintiff being the highest bidder, adjourned the sale, and then purchased the property at a lower rate.<sup>8</sup> In such case, the acknowledgment of the sheriff's deed, and the payment of the price, is no ground for refusing to set aside the sale, if the deed still remains in the sheriff's hands.<sup>9</sup>

*Grounds for setting aside the sale.*—In describing the sheriff's duties in regard to the conduct of the sale, we have already enumerated many of the grounds upon which the court will interfere to set the sale aside. For the defects in description, discrepancies between the handbills and advertisements, insufficiency of notice, irregularities in the time, manner, or conditions of the sale, misconduct on the part of the purchaser, and illegal agreements between bidders, which may constitute a good ground for setting aside the sale, reference is made to the preceding pages.

*Mere inadequacy of price* is not sufficient ground for setting the sale aside;<sup>10</sup> and where security was offered that the property if again set up for sale should bring a large advance, the court declared that they had no power to open the biddings, and refused to set aside the

<sup>1</sup> Connell v. Hughes, D. C. Phila., 8 Leg. Int. 130; s. c. 1 Phila. Rep. 225.

<sup>2</sup> Laird v. Laird, D. C. Lanc., 3 P. L. J. 474.

<sup>3</sup> Glassell v. Wilson, 4 Wash. C. C. R. 59.

<sup>4</sup> Young v. Wall, D. C. Phila., 1 Phila. Rep. 69; George v. Graham, D. C. Phila., 7 Leg. Int. 98; 1 Phila. Rep. 69, s. c.

<sup>5</sup> Young v. Wall, *supra*.

<sup>6</sup> Meanor v. Hamilton, 3 Casey 137.

<sup>7</sup> Stephens v. Stephens, D. C. Alleg.,

1 Phila. Rep. 108.

<sup>8</sup> Vanernan v. Cooper, D. C. Alleg., 9 P. L. J. 266.

<sup>9</sup> *Ibid*.

<sup>10</sup> Weitzell v. Fry, 4 Dallas 221; Murphy v. McCleary, 3 Yeates 405; Cooper v. Galbraith, 3 W. C. C. R. 546; 2 Conn. Rep. 821, 825; Dickey's Case, C. P., April 1820, 1 Journ. Juris. 92; Carson's Sale, 6 Watts 140; Simon v. Simon, 1 Miles 404; Young's Appeal, 2 Pa. R. 380.

sale.<sup>1</sup> But, whenever there is an appearance of fraud, the inadequacy of price, though not conclusive in itself, affords an argument in favor of setting aside the sale, which is of great weight against a purchaser to whom the fraud is imputed.<sup>2</sup> Where the inadequacy is very gross, the court will take advantage of any irregularity in the proceedings, however slight.<sup>3</sup> Thus, a deviation from the established order of selling;<sup>4</sup> the omission of the name of the village where the property lies;<sup>5</sup> omitting to mention the right to an alley;<sup>6</sup> have been held sufficient grounds for setting aside the sale, when accompanied by evidence of inadequacy of price. But commencing the sale earlier than usual, the change of hour having been duly advertised;<sup>7</sup> or not giving the plaintiff's counsel special notice of the intended sale, according to an alleged practice;<sup>8</sup> are not grounds for setting aside the sale, even though the price is inadequate.

Where the inadequacy is not very gross, security is required that a greater sum will be offered at a second sale.

But no amount of inadequacy is sufficient reason for setting the sale aside where the proceedings are strictly regular.<sup>9</sup>

Where there is a doubt as to the fact of inadequacy of price, the offer of security that the property will bring at a second sale a certain sum, much larger than it brought before, will have decisive weight with the court in determining the question.<sup>10</sup> And it is no evidence to show that a third person, who is not himself called and examined under oath, has stated that he would give a greater sum if the property was put up again.<sup>11</sup>

<sup>1</sup> Dickey's Case, *supra*; Percival v. Bryant, 7 P. L. J. 196.

<sup>2</sup> *Ibid.*

<sup>3</sup> Whitacre v. Pratt, D. C. Phila., 1 Am. L. J. 190; s. c. *ante* p. 998, note 1, Evans v. Miller, D. C. Phila., Saturday, June 10th 1848. Why sheriff's sale should not be set aside. *Per curiam*. Sheriffs' sales are never set aside merely for inadequacy of price, though in cases where it is very gross the court will take advantage of an irregularity in the proceedings, which, under other circumstances, they might be disposed to overlook. Here it is by no means clear that there has been any such gross inadequacy as to bring the case within the category here referred to. Without that consideration, the mistake of an inch or two in the breadth or depth of the lot, and which evidently had no influence on the sale, is too trifling to justify our interposition. Especially would our interference be unwarrantable where, as here, the sale is upon a fourth *pluries levati facias*, the same description having been inserted and continued in this long series of writs and advertisements without objection by the defendant. Rule dismissed.

<sup>4</sup> Sergeant v. Goslin, C. P. Phila., 1 Phila. Rep. 301.

<sup>5</sup> Whitacre v. Pratt, *ubi supra*.

<sup>6</sup> Ulrich v. McCann, *ante*, p. 998, note 2.

<sup>7</sup> Campbell v. Ruddach, D. C. Phila., Dec. 23d 1848. Why sheriff's sale should not be set aside. *Per curiam*. Inadequacy of price is, of itself, no reason for setting aside a sale. Here the circumstance relied on to take the case out of the general rule, is, that the sale on this occasion commenced half an hour earlier than the previous sale of the sheriff. The change of hour, however, was duly notified in the bills and advertisements; and it is notorious that the hour for commencing such sales varies with the different seasons of the year. This, therefore, is no ground whatever for our interference. Nor can we perceive any for making any difference in these cases when the purchaser is a member of the bar. Rule discharged.

<sup>8</sup> Kern v. Murphy, 2 Miles 157.

<sup>9</sup> Whitacre v. Pratt, *supra*, note 3.

<sup>10</sup> *Ibid.* s. c., 1 Am. L. J. 190.

<sup>11</sup> Steinmetz v. Stokes, D. C. Phila. Oct. 1848, *supra*, p. 999, note 2.

*Misdescription* of the property in the sheriff's handbills or advertisements, is a good ground for setting aside the sale, as has already been seen.<sup>1</sup> But, if it appears that the defendant acquiesced in the sale under an erroneous description, with a view of the property being bought in by a friend, the court would not interfere at his instance.<sup>2</sup>

*Mistake*.—Where the purchaser has been seriously misled by the sheriff's representations at the sale as to the amount of liens against the property, the sale will be set aside at the cost of the purchaser.<sup>3</sup> So, where one purchases under the erroneous belief that the sale will discharge the lien of a mortgage, and the mistake is discovered before the deed is acknowledged, the court can grant relief by setting aside the sale; perhaps it might be granted even after the acknowledgment of the deed.<sup>4</sup> So, it seems, a misapprehension by the purchaser, or lien-creditor, as to his rights in reference to prior liens, might furnish a sufficient reason for the court to set the sale aside.<sup>5</sup> So, where by the plaintiff's direction the sale was made subject to prior liens, it will be set aside.<sup>6</sup>

*Misconduct*.—So, where the plaintiff being the highest bidder, had the sale adjourned, and then purchased at a lower rate, the sale will be set aside even after the acknowledgment of the sheriff's deed.<sup>7</sup> And the continuance of the sale to past 10 o'clock in the night, accompanied with a precipitate sale at a low price, whereby the plaintiff in the execution was prevented from purchasing, whereupon he desired the property to be put up again which was refused, was held sufficient ground to set aside the sale.<sup>8</sup>

*Irregularities in the sale or process*.—Where the sheriff sells different parcels or houses together, as a general rule the sale will be set aside, and the court will not require it to appear that the price was inadequate;<sup>9</sup> if made without the assent of the parties.<sup>10</sup> And neither a common disadvantage, or encumbrance, nor a common privilege, is any decisive reason for selling them together.<sup>11</sup> So where several properties are *advertised* as one though sold separately, the sale will be set aside.<sup>12</sup>

But where the sale is made in the lump, by special agreement, and the purchaser stood in such relation to the transaction that he

<sup>1</sup> *Ante*, p. 997.

<sup>2</sup> *Fisher v. Stokes*, D. C. Phila., May 12th 1849. Why sheriff's sale as to second described property should not be set aside. *Per curiam*. The misdescription in this case is very palpable; and though if it appeared that defendant had acquiesced, with a view to the property being bought in by a friend, we would not interfere, we cannot act upon such a surmise without notice. To conclude a defendant in case of misdescription, he should have distinct notice of the intended description before the advertisement within a reasonable time, so that he may have the opportunity of having it amended. R. A. .

<sup>3</sup> *Finley's Executor v. McCulley's Adm'r.*, D. C. Alleg., 2 Phila. Rep. 212.

<sup>4</sup> *Cummings' Appeal*, 11 Harris 509.

<sup>5</sup> *Crawford v. Boyer*, 2 Harris 380.

<sup>6</sup> *Dunlap v. Gray*, D. C. Alleg., Lower, J.

<sup>7</sup> *Vanernan v. Cooper*, D. C. Alleg., 9 P. L. J. 266.

<sup>8</sup> *Greenwood v. Lehigh Coal Co.*, 3 P. L. J. 22.

<sup>9</sup> *Connell v. Hughes*, D. C. Phila., 1 Phila. Rep. 225.

<sup>10</sup> *Tate v. Carberry*, D. C. Phila., 1 Phila. Rep. 133.

<sup>11</sup> *Ibid*.

<sup>12</sup> *Hoeckley v. Henry*, C. P. Phila., 3 Phila. Rep. 34.

would naturally be expected to be alive to all the particulars of the description, the court refused to set aside the sale on his application made on the ground that the number of lots (in a cemetery) was overstated in the advertisement.<sup>1</sup>

Where the sheriff sells a single property at the same time under different writs against different defendants, the sale is irregular and invalid and will be set aside: it should have been sold under each writ separately, or one of them only.<sup>2</sup>

Any irregularity in the process is ground for setting aside the sale, and the objection should be taken in this way, for the defect will generally be cured by suffering the deed to be acknowledged. Thus the omission to give notice of the inquisition;<sup>3</sup> the absence of a regular condemnation, or of the waiver of inquisition;<sup>4</sup> the absence of the *scire fa. quare ex. non*, in cases where such writ is requisite;<sup>5</sup> the issuing of the *fi. fa.* and *vend. exp.* on the same day and to the same term;<sup>6</sup> the sale of land already extended, under an *alias fi. fa.* issued without leave on the same judgment;<sup>7</sup> are all grounds for setting aside the sale.

But where lands were sold under a *fi. fa.* it is no ground for setting aside the sale that the writ only directed the sheriff to levy on goods and chattels.<sup>8</sup>

It will not be set aside upon the application of the purchaser for a defect in the title where there has been no fraud in the sale.<sup>9</sup> Especially if notice of adverse title was given at the sale, though the purchaser being deaf did not hear so as to understand such notice.<sup>10</sup> But it will be set aside where the sheriff has led the purchaser to believe that he was selling the legal title, when in fact the defendant had but an equitable title.<sup>11</sup>

It is no ground for setting aside the sale that the purchaser was a defendant, husband of another defendant, and had in conjunction with his wife's trustee executed a mortgage of her separate estate

<sup>1</sup> Monument Cemetery Co. v. Potts, D. C. Phila., 1 Phila. Rep. 251.

<sup>2</sup> Build. Ass. v. Henry, D. C. Phila., 3 Phila. Rep. 34; Hoeckley v. Henry, C. P. Phila., Ibid.

<sup>3</sup> Meanor v. Hamilton, 3 Casey 137.

<sup>4</sup> Spragg v. Shriver, 1 Casey 282.

<sup>5</sup> Vastine v. Fury, 2 S. & R. 430; Hinds v. Scott, 1 Jones 27.

<sup>6</sup> Hadden v. Clark, 2 Grant 107.

<sup>7</sup> Wilson v. Howser, 2 Jones 109.

<sup>8</sup> Andrew v. Fleming, 2 Dall. 93.

<sup>9</sup> Juniata Bank v. Brown, 5 S. & R. 226. And see post, "Purchaser's Title."

<sup>10</sup> Hough v. Lorentz, D. C. Phila., November 17th 1849. Rule to set aside sheriff's sale. *Per curiam.* *Caveat emptor* is the rule which rigidly applies to sheriffs' sales, as far as title and encumbrances are concerned. It might easily be made to appear that the inconveniences of allowing a bidder at a public judicial sale to come in and be relieved from his bid, on the ground that

the defendant had no title, or an imperfect one, would far outweigh the occasional hardship of a case, where an ignorant or ill-advised purchaser may lose his money without an equivalent, or be involved in a lawsuit. In this instance, however, ignorance cannot be properly allowed as an excuse, even though it may have existed; for clear and distinct notice that the title of the purchaser would be controverted was made at the sale. That the purchaser was deaf, and did not hear so as to understand the import of the notice which was made, does not make the case any better. He should act in such matters through the agency of others. The objections which have been urged to the advertisement are mere typographical errors, by which a vigilant man, who had made the necessary searches, could not have been misled. R. D.

<sup>11</sup> Auwerter v. Mathiot, 9 S. & R. 397.

which by the terms of the trust might have been executed without him.<sup>1</sup> Nor where the sale was under a judgment on the bond accompanying a mortgage of wife's realty given by husband and wife, will it be set aside on the ground that the purchaser supposed he was buying the fee instead of the husband's curtesy.<sup>2</sup>

Where, in consequence of the sickness of plaintiff's counsel, and his consequent inability to attend the sale, a loss accrued to his client, the court said that the sale should be set aside upon a stipulation to pay the costs of the sale, and that the property should bring as much, at a second sale, as the affidavits alleged it ought to have brought.<sup>3</sup> In this case the counsel had sent an agent to the sale with instructions to bid up to a certain price: the agent only knew the property from the defendant's name, which the sheriff omitted to read, by which omission the agent was prevented from bidding, and the property brought only one-fifth of the price he was instructed to bid for it.

If puffers be employed at the sale to raise the price against the real bidders, it is a fraud upon them and the sale will be set aside.<sup>4</sup>

Where several parcels of land were levied on, and the sale of the first parcel was sufficient to satisfy all the liens, the sale of the remaining parcels was set aside.<sup>5</sup>

The discovery after the inquisition of sufficient personal property to pay the debt is not ground for setting aside the sale.<sup>6</sup>

*Failure of purchaser to comply with his contract.* *Resale of the property.*—When the purchaser fails to comply with the terms of his contract by paying the amount of his bid in the manner stipulated in the conditions of sale, he is liable in an action for the amount bid, or the property may be sold again, and the purchaser at the first sale is liable for the loss arising from the diminution of price at the second sale.<sup>7</sup> But unless the bidder is notoriously insolvent, the sheriff cannot, long before the return day, return that the purchaser has not paid, and therefore that the property remains unsold for want of buyers; and where he does so, and has made no demand, and there is no evidence to justify him in so doing, the bidder is not liable for a difference in price.<sup>8</sup>

The sheriff is not bound to give the first purchaser notice of the time and place of the second sale; it is sufficient to notify him that unless he pays the money the property will be sold again, and even this seems not to be requisite.<sup>9</sup>

He may, at his own risk, refuse to give a deed to the delinquent purchaser, and the merits of the purchaser's case may be ascertained in an action by him against the sheriff.<sup>10</sup>

<sup>1</sup> Kern v. Murphy, 2 Miles 157.

<sup>2</sup> Elkin v. Meredith, 2 Miles 167.

<sup>3</sup> Garret v. Shaw, D. C. Phila., vend. exp., June 7th, 1830.

<sup>4</sup> Donaldson v. McRoy, 1 Browne 346; 1 Jour. Jurisp. 91.

<sup>5</sup> Richards v. Brittin, D. C. Phila., 5 P. L. J. 73.

<sup>6</sup> Hunt v. McClure, 2 Yeates 387.

<sup>7</sup> Negley v. Stewart, 10 S. & R. 207;

Scott v. Greenough, 7 S. & R. 197;

Spang v. Schneider, 10 Barr 193;

Wright's Appeal, 1 Casey 373.

<sup>8</sup> Holdship v. Doran, 2 Pa. R. 18, Huston, J.

<sup>9</sup> Gaskell v. Morris, 7 W. & S. 32.

<sup>10</sup> Vastine v. Fury, 2 S. & R. 435. See

Auwerter v. Mathiot, 9 S. & R. 397;

We dler v. Farmers' Bank, 11 S. & R. 134.

The sheriff is the proper person to sue for damages in case the purchaser refuses to take the land.<sup>1</sup> But it seems the action may be brought in the name of some one who was injured.<sup>2</sup>

The measure of damages is the difference between the prices bid at the two sales, together with the costs of the second sale.<sup>3</sup> If this amount is under one hundred dollars, the District Court has not jurisdiction.<sup>4</sup>

If the purchaser has bid under a misapprehension of his rights, or the description in the levy is incorrect, he should apply to have the sale set aside.<sup>5</sup> He cannot refuse to comply, and then set up his misapprehension or defective description as a defence to the action to recover the loss on a resale.<sup>6</sup>

Where the purchaser was the plaintiff in the execution, he cannot set up the defective description in the levy as a defence.<sup>7</sup> And as judicial sales are subject to the rule *caveat emptor*, the existence of encumbrances, of which the purchaser had no notice at the sale, or even a mistaken assertion by the sheriff that there were no encumbrances, will not discharge the purchaser from his liability.<sup>8</sup> Nor will defect of title be a defence where the sale was fairly made.<sup>9</sup> And the same rule applies to a sale under an order of court in an action of partition.<sup>10</sup> And to sales by order of Orphans' Court.<sup>11</sup> Nor is the first purchaser discharged by the fact that the holder of the mortgage, under which the sale was made, became the purchaser at the resale; whether the resale did or did not discharge the mortgage does not affect his liability for the loss.<sup>12</sup>

But it seems the purchaser may resist payment of the money on the ground that there has been no judgment, or that the court had no jurisdiction.<sup>13</sup>

But a bidder has a right to retract his bid, notwithstanding the sheriff has attempted to prescribe conditions to the contrary, and if he so retracts, he is not liable even for the costs and charges at a future sale, though one of the conditions of the sale was to that effect.<sup>14</sup>

It has been questioned whether the first purchaser is discharged from his liability by a modification, at the resale, of the former conditions of sale. If the modifications are made without the sanction

<sup>1</sup> Gaskell v. Morris, 7 W. & S. 32.

<sup>2</sup> Holdship v. Doran, 2 Pa. R. 9.

<sup>3</sup> Gaskell v. Morris, 7 W. & S. 32; Lelar v. Gault, D. C. Phila., 2 Phila. Rep. 78.

<sup>4</sup> Lelar v. Gault, *supra*.

<sup>5</sup> Davis v. Baxter, 5 Watts 519; Cooper v. Borrall, 10 Barr 491; Crawford v. Boyer, 2 Harris 383; Allen v. Gault, 3 Casey 473. But if the court refuse to set aside the sale, there is no appeal: Crawford v. Boyer, *supra*.

<sup>6</sup> Davis v. Baxter, 5 Watts 519; Spang v. Schneider, 10 Barr 193; Crawford v. Boyer, 2 Harris 383; Emley v. Drum, 12 Casey 123.

<sup>7</sup> Spang v. Schneider, 10 Barr 193.

<sup>8</sup> Wood v. Levis, 2 Harris 9.

<sup>9</sup> Smith v. Painter, 5 S. & R. 223; Friedley v. Scheetz, 9 S. & R. 156; Auwerter v. Mathiot, Ibid. 397; Weidler v. Farmers' Bank, 11 S. & R. 164; Allen v. Gault, 3 Casey 473.

<sup>10</sup> Allen v. Gault, *supra*.

<sup>11</sup> Bashore v. Whisler, 3 Watts 490; Fox v. Mensch, 3 W. & S. 444; King v. Gunnison, 4 Barr 172; Lantz v. Worthington, Ibid. 153.

<sup>12</sup> Forster v. Hayman, 2 Casey 266.

<sup>13</sup> Com. of Armstrong v. Smith, 10 Watts 392; McMichael v. Skilton, 1 Harris 215.

<sup>14</sup> Fisher v. Seltzer, 11 Harris 308.

of the court, he is discharged;<sup>1</sup> but when a sale falls through from default of the buyer, and there is reason to believe that the purchase was made without any intention of paying for it, in pursuance of a preconcerted scheme to defeat the ends of justice, and prevent or delay the completion of the sale, there must be a power somewhere to prevent a repetition of the same course by making the terms of the second sale cash, even when those of the first have been credit, and requiring the whole or part of the price to be paid down at the time of the bid, without releasing the guilty party from his liability, which is the only penalty for his misconduct.<sup>2</sup>

Where the conditions of sale stipulate that a certain sum shall be paid when the property is struck down, such payment is not to be construed as a penalty for, but as a pledge to prevent, a failure to complete the purchase; the purchaser failing to pay such stipulated sum is liable for the loss on a resale, although the property was not set up again immediately, as stated in the conditions of sale, but was afterwards sold on an *alias* writ.<sup>3</sup> So where the purchaser paid a part of the purchase-money at the time of the sale, but fails to pay the residue, the sheriff may return the property unsold, and the delinquent purchaser will be liable for the loss on a resale; and where the loss on the resale is greater than the amount paid the sheriff on the first sale, the court, unless objection be shown, may distribute the amount so paid among the creditors of defendant.<sup>4</sup>

In the action, by the sheriff, against the delinquent purchaser, the writs of *alias* and *pluries vend. exp.* are not evidence without the judgment; but if they are admitted, the error is cured by afterwards reading the record in evidence.<sup>5</sup> The return made in the name of the sheriff, and signed by his authorized deputy, is evidence to show the fact of the sale.<sup>6</sup> The sale not being within the Statute of Frauds, may be proved otherwise than by the production of a formal return to the writ.<sup>7</sup> The written conditions of sale were held evidence in such action without direct proof that defendant was present, and heard them read.<sup>8</sup>

The return that the property was sold to D. for H., coupled with a refusal by the court to set aside the sale on the application of H., who had disclaimed the authority of D., and notified the sheriff to that effect, does not establish a liability on which the sheriff can maintain an action against H. for the loss on a resale.<sup>9</sup>

Written conditions of sale are evidence where they were read aloud by the sheriff's agent, at the opening of the sale, and some evidence was given that the defendant was present before and during the sale, and there was proof that he signed a written acknowledgment that he had become the purchaser.<sup>10</sup>

<sup>1</sup> *Banes v. Gordon*, 9 Barr 426.

<sup>2</sup> *Whillden v. Singery*, D. C. Phila., 15 Leg. Int. 325; s. c., 1 Phila. Rep. 218.

<sup>3</sup> *Forster v. Hayman*, 2 Casey 266.

<sup>4</sup> *Wright's Appeal*, 1 Casey 373.

<sup>5</sup> *Gaskell v. Morris*, 7 W. & S. 32.

See however, *Davis v. Baxter*, 5 Watts 519.

<sup>6</sup> *Emley v. Drum*, 12 Casey 123.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Gaskell v. Morris*, 7 W. & S. 32.

<sup>9</sup> *Lelar v. Holmes*, 6 Harris 281.

<sup>10</sup> *Gaskell v. Morris*, 7 W. & S. 32.



*Of the return to the venditioni, and herein of the alias venditioni*—The officer making sale of any real estate under execution, must make return thereof, endorsed or annexed to such writ.<sup>1</sup> Even before the Act of 1836 he was required in Philadelphia by rules of the several courts, still in force,<sup>2</sup> to return the writ before he could acknowledge the deed. But omission to return the *vend. exp.* does not invalidate the sale; it is cured by the acknowledgment of the deed reciting that the sale was made under the *vend. exp.*<sup>3</sup> Even where it was not returned till several years after the acknowledgment, and after the sheriff had gone out of office.<sup>4</sup>

The return is subject to the general principles already explained.<sup>5</sup> When a lien-creditor has purchased at the sale, the sheriff must state that fact in the return and attach thereto a list of the liens upon the property.<sup>6</sup>

A return of "money made" discharges the debt and fixes the right of the plaintiff and the liability of the sheriff:<sup>7</sup> therefore where a *terre-tenant*, erroneously supposing the judgment to be a lien on his land, paid the money to the sheriff, who returned the *venditioni* "money made by" the *terre-tenant*, the latter having ruled the money into court before the return day, and proved that he paid under a mistake, cannot take it out in preference to the plaintiff in the execution.<sup>8</sup>

When the officer cannot sell he must make return that he exposed such real estate to sale, and the same remained in his hands unsold for want of buyers: he is not liable on such return to answer the debt or damages mentioned in the writ.<sup>9</sup>

Where the purchaser refuses or neglects to comply with his contract, the writ is returned, "sold to A. B. for \$— and unsold for want of buyers;"<sup>10</sup> or that "the premises were knocked down to A. B. for so much; and the said A. B. has not paid the purchase-money, and that therefore the premises remain unsold."<sup>11</sup>

If the purchaser pay a portion of the price at the time of the sale, but afterwards fails to pay the residue, the sheriff may return the land unsold, and if he omits in his return to state the sum received from the bidder, he may with leave of the court amend his return after the second sale so as to state this fact.<sup>12</sup>

And when after a sale he returns the land unsold for want of buyers, the purchaser having delayed payment, and upon a second writ he sells it to the plaintiff, the court may before the deed is acknowledged set aside the second and confirm the first sale: in such case they do not exceed their powers by making an order on the

<sup>1</sup> Act 16th June 1836, § 94, *Purd. Dig.* 448, pl. 114, *Pamph. L.* 778.

<sup>2</sup> Rules D. C., LXXIX.; C. P., XXXI., § 3; S. Ct. N. P., XXII.

<sup>3</sup> *Gibson v. Winslow*, 2 *Wright* 49.

<sup>4</sup> *Smull v. Mickley*, 1 *Rawle* 95; *Hinds v. Scott*, 1 *Jones* 26. See *Dalzell v. Crawford*, 1 *Pars.* 37.

<sup>5</sup> *Ante*, p. 872, "Of the Return and its Incidents."

<sup>6</sup> Act 20th April 1846, § 2, *Purd. Dig.* 446, pl. 101, *Pamph. L.* 411. And see

*post*, p. 1031, "Receipt of money by sheriff when a lien-creditor becomes the purchaser."

<sup>7</sup> *Boas v. Updegrove*, 5 *Barr* 516.

<sup>8</sup> *Ibid.*

<sup>9</sup> Act 16th June 1836, § 64, *Purd. Dig.* 442, pl. 77, *Pamph. L.* 772.

<sup>10</sup> *Gaskell v. Morris*, 7 *W. & S.* 32.

<sup>11</sup> *Zantzing v. Pole*, 1 *Dallas* 419. But see *Worstman v. Conyngham*, 1 *P. C. C.* 241.

<sup>12</sup> *Wright's Appeal*, 1 *Casey* 373

sheriff to amend his return to the first writ.<sup>1</sup> Where the sheriff made a clerical mistake in the Christian name of the purchaser, he was, on satisfying the court of the fact, permitted to amend the return and the deed according to the truth, and directed to re-acknowledge the deed.<sup>2</sup> Defective or informal returns to any execution upon which a sale has been effected may be amended, on the application of the purchaser, or other person interested in the sale, made by bill or petition to the court which issued the writ, setting forth the facts, and upon notice given in a manner directed by the court, to the purchaser, or defendant, their heirs, executors, administrators, or devisees, and to all other persons interested to appear in court on a day certain to be fixed by the court, and answer such bill or petition: on the hearing the court has power to examine into the facts, and make such order and decree as justice and equity may require, either by dismissing the application or by correcting and amending the return, and directing the sheriff for the time being to execute a deed to the purchaser, or to such other person, for the use of those entitled thereto, upon such terms and conditions as the court may determine, and justice and equity require; which deed thus executed, and acknowledged in the ordinary manner, shall be as effectual in law as if the proper return had been made, and the title completed, according to law.<sup>3</sup>

*Alias venditioni exponas.*—If the real estate cannot be sold, then the officer must return that he exposed it to sale, and that it remained in his hands unsold, for want of buyers, and such return will not make him liable for the debt or damages mentioned in the writ.<sup>4</sup> Upon this return the plaintiff may take out an *alias* or *pluries* writ as the case may be, and upon it again endeavor to make a sale of the premises.<sup>5</sup> The proceedings upon the *alias* or *pluries* are the same as on the first writ.<sup>6</sup>

*Of the sheriff's deed and its acknowledgment.*

*Of the deed generally.*—When the sheriff or other officer has made sale of real estate under execution, it is his duty to return the same, endorsed or annexed to the writ, and to give the buyer a deed for what is sold duly executed and acknowledged in court.<sup>7</sup> A seizure of land by the sheriff under a *fi. fa.* does not divest the estate of the debtor; nor does a sale by the sheriff, unless the money

<sup>1</sup> *Vastine v. Fury*, 2 S. & R. 426.

<sup>2</sup> *Rapin v. Dealy*, 1 Miles 339.

<sup>3</sup> Act 21st April 1846, § 1, *Purd.* Dig. 449, pl. 125, *Pamph. L.* 430.

<sup>4</sup> Act 16th June 1836, § 64, *Purd.* Dig. 442, § 77, *Pamph. L.* 772.

<sup>5</sup> The sixty-fifth and sixty-seventh sections of the Act of 1836, since repealed by the ninth section of the Act of 13th October 1840, *Pamph. L.* 2, provided for a new valuation of the land returned unsold for want of buyers, and for the delivery of the land, or so much of it as should be requisite, under a *liberari facias*, to the plaintiff in fee simple, in satisfaction of his debt.

And in case of his eviction, after accounting for the profits, he might have a *scire facias* for the balance of his judgment against the defendant or his personal representatives. The plaintiff might elect either this proceeding or the *alias vend. exp.* Though the repealing act saves cases in which proceedings were already commenced, it is considered hardly likely that any such are now *in esse*, and therefore that a mere reference to this obsolete proceeding is all that is requisite.

<sup>6</sup> See *Gaskell v. Morris*, 7 W. & S. 32.

<sup>7</sup> Act 16th June 1836, § 94, *Purd.* Dig. 448, pl. 114, *Pamph. L.* 778.

is paid and a deed delivered.<sup>1</sup> But the non-return of the *vend. exp.* will not affect the validity of the sheriff's deed; the court may consider the deed as his return: and a misrecital of the *vend. exp.* is open to correction.<sup>2</sup> Nor will the entire omission to recite the execution in the deed affect its validity, so long as the sheriff possessed a sufficient authority to warrant the sale.<sup>3</sup>

The deed should describe the land conveyed with reasonable certainty, and unless so described no estate passes to the grantee,<sup>4</sup> and a special return upon the writ seems not to be sufficient.<sup>5</sup> If the deed by mistake called for the land of P. C. as adjoining in a particular direction, the latter could not be bound by the error, and consequently those who claim under him have no right to insist upon it as precluding the sheriff's vendees by estoppel, from showing the truth.<sup>6</sup> The stamp duties upon the deed are to be taxed with the costs and paid out of the proceeds.<sup>7</sup>

*Recitals in the deed.*—The purchaser may have the judgment, the executions, and the returns made thereto, recited fully and at large in the deed, and if the prothonotary, by order of the court, certifies under the seal of the court, that the record is recited in such deed truly, fully, and entire as the same remains in his office, the deed will be as good evidence in a suit wherein the land is in controversy as the original records would be if produced and offered in evidence.<sup>8</sup> And an omission to return the writ will not invalidate the sale, but may be supplied by the recitals in the deed.<sup>9</sup> The recital in a sheriff's deed that the sale was made by a former sheriff, is not conclusive evidence of the fact, but the party claiming under it may show *aliunde* that it was in fact made by the same sheriff who made the deed.<sup>10</sup> And a recital that the sale was made on a certain day does not estop the grantee from showing that it was made on another day.<sup>11</sup>

*Effect of deed as evidence.*—The possession of the deed is *prima facie* evidence of the delivery and of the payment of the purchase-money, without a receipt at the foot of it; the acknowledgment of the receipt in the body of the deed is sufficient: besides, by making a deed the sheriff fixes himself for the price bid, to the creditor and the owner.<sup>12</sup> And a sheriff's deed defectively acknowledged is evidence to show that a party holding under it is not a mere intruder, but is in under color of title.<sup>13</sup> And where the *vend. exp.* has been lost, but there is evidence from the docket entries and *aliunde* that several lots, as numbered on a plan, were sold under it, the deed may be used as evidence to identify the lots sold to particular individuals.<sup>14</sup>

<sup>1</sup> 8 Johns. 520.

<sup>2</sup> *Hinds v. Scott*, 1 Jones 19; and see *Smull v. Mickley*, 1 Rawle 95, but this was prior to the Act of 1836.

<sup>3</sup> 10 Johns. 381.

<sup>4</sup> 11 Johns. 365; 13 *Ibid.* 537.

<sup>5</sup> 13 Johns. 471.

<sup>6</sup> *Cramer v. Carlisle Bank*, 2 Grant 267.

<sup>7</sup> Act 15th April 1863, § 2, Pamph. L. 477.

<sup>8</sup> Act 16th June 1836, § 95, *Purd.* Dig. 448, pl. 115, Pamph. L. 778.

<sup>9</sup> *Gibson v. Winslow*, 2 Wright 49.

<sup>10</sup> *Leshey v. Gardner*, 3 W. & S. 314.

<sup>11</sup> *Hall v. Benner*, 1 Pa. R. 402.

<sup>12</sup> *Hinds v. Scott*, 1 Jones 19; s. c., 2 Am. L. J. 34; *Foster v. Gray*, 10 Harris 9.

<sup>13</sup> *Wilson v. Howser*, 2 Jones 109.

<sup>14</sup> *Woods v. Halsey*, 9 Barr 144.

*Lost deeds.*—It seems if the deed be lost, the court on application, accompanied by affidavits, may direct the sheriff to execute another deed.<sup>1</sup> And after showing a sale, and the record of acknowledgment, the petition of an attorney of the purchaser, praying that a new deed might be acknowledged, together with his affidavit of the loss of the former deed, may be given in evidence to show the existence and loss of the deed.<sup>2</sup>

*Recording the deed.*—The deed may be recorded in the office of the recorder of deeds of the county where the lands lie, and the record or a duly certified copy thereof is evidence in all cases where the original would be evidence: and in Philadelphia, where the practice is to record sheriffs' deeds in the prothonotaries' offices, the record or a duly certified copy is evidence in like manner; and this applies to all deeds recorded prior to the act.<sup>3</sup>

It was held before this act that an exemplification of a record of a sheriff's deed was inadmissible in evidence, because the mode of authentication of such deeds did not bring them within the purview of the recording acts.<sup>4</sup> But it has been held that the registering of a sheriff's deed in the prothonotary's office, after acknowledgment, is a sufficient recording within the Act of 1775.<sup>5</sup> But the prothonotary's minute of the acknowledgment is not evidence of title, if the non-production of the deed be in no way accounted for.<sup>6</sup> The prothonotary is not entitled to a fee for recording a sheriff's deed.<sup>7</sup> But it seems to be assumed, in the Act of 15th March 1862, that he is entitled to a fee for such service.<sup>8</sup>

*Custody of deeds not called for by purchasers.*—The prothonotary on the expiration of his term of office must deposit in the custody of his successor, all sheriff's deeds in his possession which have not been called for by the parties entitled thereto; which shall be delivered to the purchasers upon payment of the recording fees, if not already paid, and if he fail to deposit such deeds with his successor he is liable to a penalty of \$20, recoverable in debt, one-half to be paid to the county treasurer, and one-half to the person bringing the action.<sup>9</sup>

Where the act erecting a new county provided that in sheriff's sales, made in the old county of land situated in the new county, the deed should be entered on the docket of the Common Pleas in the new county within thirty days after the acknowledgment, the object of this provision was to give notice to purchasers, and none but *bonâ fide* purchasers before the actual entry of the deed, can take advantage of the omission to have it entered within thirty days.<sup>10</sup>

*Of the acknowledgment of a sheriff's deed.*—The acknowledg-

<sup>1</sup> Gray v. Coulter, 4 Barr 192.

<sup>2</sup> Ibid.

<sup>3</sup> Act 14th March 1846, § 1, Purd. Dig. 319, pl. 61, Pamph. L. 124. This Act is constitutional, Foster v. Gray, 10 Harris 9.

<sup>4</sup> Seechrist v. Baskin, 7 W. & S. 403.

<sup>5</sup> Shrider's Lessee v. Nargan, 1 Dallas 69; McCormick v. Meason, 1 S. & R. 96; Feger v. Keefer, 6 Watts 298;

Naglee v. Albright, 4 Whart. 291; Stonebreaker v. Short, 8 Barr 155.

<sup>6</sup> Lodge v. Berrier, 16 S. & R. 297.

<sup>7</sup> Gault v. Vinyard, D. C. Phila., 27th December 1852, MS.

<sup>8</sup> See next paragraph.

<sup>9</sup> Act 15th March 1862, Purd. Dig. 1275, pl. 2, Pamph. L. 125.

<sup>10</sup> Graham v. Smith, 1 Casey 323.

ment is prescribed by the Act of 1836.<sup>1</sup> Until it has been made, the legal title does not pass; the vendee cannot demand the rents, or recover the possession.<sup>2</sup> But it would seem that it does not appear to be indispensably requisite in all cases, as after a great lapse of time and no objection made by the debtor.<sup>3</sup> But generally speaking the deed is not complete, and cannot be recorded or given in evidence until it is acknowledged,<sup>4</sup> and to give the purchaser the right to notify the tenant to remove, under the Act of 1802, the acknowledgment was essential.<sup>5</sup> But a sheriff's deed defectively acknowledged is evidence to show that a party holding under it is not a mere intruder, but is in under color of title.<sup>6</sup> And a sheriff's deed for leasehold premises need not be acknowledged, nor is any deed necessary, for his return is evidence of the sale of a chattel whether real or personal.<sup>7</sup>

*The place where it is to be made.*—It can be made nowhere but in court.<sup>8</sup> In the case of executions from the Supreme Court the acknowledgment is to be made before that court in banc sitting within the district, or before one of the judges sitting at *Nisi Prius* within the county where the lands lie, or before the Common Pleas or District Court of the city and county where the lands lie.<sup>9</sup> In such case the District Court has no authority until application has been made by the sheriff or by some one for him.<sup>10</sup> Where lands situate in Dauphin county were sold under an execution upon a judgment obtained in the Supreme Court in Philadelphia, it was held that the acknowledgment must be made, if before the Supreme Court, at its session in the Middle District and not in the Eastern District.<sup>11</sup>

In the case of *testatum* writs of execution the acknowledgment may be made in the Common Pleas or District Court of the county where the lands lie.<sup>12</sup> Where the acknowledgment in either of the above cases is to be made in one court, under an execution issued from another court, the proper practice is for the sheriff to apply to the former court by petition, informing them of the fact of the sale under the execution of the other court, and praying for leave to acknowledge, on a certain day so far in advance, that he may be able to give the notice required by the act.<sup>13</sup> This notice of the

<sup>1</sup> Sect. 94, *Purd. Dig.* 448, pl. 114, *Pamph. L.* 778.

<sup>2</sup> *Bellas v. McCarty*, 10 *Watts* 13.

<sup>3</sup> *Lessee of Moorhead v. Pearce*, 2 *Yeates* 458.

<sup>4</sup> *Hawk v. Stouch*, 5 *S. & R.* 161.

<sup>5</sup> *Ibid.*; *Hall v. Benner*, 1 *Pa. R.* 402.

<sup>6</sup> *Wilson v. Howser*, 2 *Jones* 109.

<sup>7</sup> *Sowers v. Vie*, 2 *Harris* 99.

<sup>8</sup> *Woods v. Lane*, 2 *S. & R.* 55.

<sup>9</sup> Act 16th June 1836, § 96, *Purd. Dig.* 448, pl. 116, *Pamph. L.* 778.

<sup>10</sup> *Fund v. Chew*, *D. C. Phila.*, September 1847.

<sup>11</sup> *Chambers v. Carson*, 2 *Whart.* 437.

<sup>12</sup> Act 16th June 1836, § 96, *ubi supra*.

<sup>13</sup> *Weigand v. Matthews*, *D. C. Phila.*, October 27th 1849. Why application, made by the purchaser, for leave to

have a sheriff's deed acknowledged to him, should not be rescinded. *Per curiam*. This is the case of an execution issuing out of the Supreme Court. It is provided by the 96th section of the Act of June 16th 1836, relating to executions, that "in the case of executions from the Supreme Court, the acknowledgment shall be made by the officer who executed the deed, before the said court, in banc, sitting within the respective district, or before one of the judges of the said court, sitting at *Nisi Prius* within the county in which such real estate may be, or before the Court of Common Pleas, or the District Court of the city and county, in which such real estate may be." The 97th section provides, that "in case of

acknowledgment must appear to have been given to the parties to the execution in the manner provided for service of summons in personal actions.<sup>1</sup> The court to which such application is made has power to examine the regularity and validity of the sale, and to set it aside for cause.<sup>2</sup>

In case of a sale under *testatum* execution it is irregular to acknowledge the deed before the court of the county where the land lies, after a rule has been granted in the court from which the process issued to show cause why the levy and subsequent proceedings should not be set aside: if such rule be made absolute and the sale be thereby set aside, the purchaser takes no title under the sheriff's deed.<sup>3</sup>

After an acknowledgment in a court other than the one from which the process issued, the sheriff must immediately return the process into the court from which it issued.<sup>4</sup>

In all other cases the acknowledgment must be made in the court from which the writ issued.<sup>5</sup> An acknowledgment in the District

acknowledgment made in any court, except that from which the execution issued," notice must be given to the parties to the execution in the manner provided for the service of a writ of summons in a personal action. And then, by the 100th section, "Where application shall have been made to any court to take the acknowledgment of a deed for real estate sold upon the process issued by any other court, the court, to which such application shall be made, shall have power to examine the regularity and validity of such sale, and set the same aside." In strictness of practice, the proper time to move for a rule to set aside the sheriff's sale, is when the sheriff has returned the writ, and thus put the court officially in possession of the fact, that a sale for a certain price, to a certain individual, had taken place, and is in court, with deed ready to be acknowledged, and proclamation thereupon made according to law. A practice, probably coeval with the administration of justice in the Province of Pennsylvania, grounded upon the convenience of suitors, has allowed such motions to be made at any time after the sale and before the return of writ. It is plain, however, that in cases under the 100th section, something must be done with the case of an execution issuing out of the Supreme Court, before it can be settled what court shall have jurisdiction. It is impossible for this court to assume the power to inquire into the regularity and validity of the sale, until it is first settled that in this court the acknowledgment is to take place as often as we had set aside

the sale; the deed might still be acknowledged in either of the other courts mentioned in the 96th section. It is plain from reason, and the express words of 100th section, that "application to the court to take the acknowledgment" is a condition precedent to the vesting of any power in the court "other than that from which the execution issued." The only question is by whom the application is to be made, and evidently it must be by the sheriff. He is the officer who executes the deed and by whom it is to be acknowledged, and he alone has a right to elect in what court to make the acknowledgment.

The proper practice in these cases, therefore, is for the sheriff to apply to the court by petition, informing them of the fact of the sale under the execution of the Supreme Court, and praying for leave to acknowledge, on a certain day, so far in advance, that he may be able to "give notice to the parties to the execution in the manner provided for the service of a writ of summons in a personal action."

In this case, the application was made by the purchaser, and was, therefore, irregular. R. A.

<sup>1</sup> Act 16th June 1836, § 97, Purd. Dig. 448, pl. 117.

<sup>2</sup> Ibid., § 100, Purd. Dig. 448, pl. 120.

<sup>3</sup> *McKeown v. Craig*, 8 Harris 170.

<sup>4</sup> Act 16th June 1836, § 99, Purd. Dig. 448, pl. 119.

<sup>5</sup> Ibid., § 96, Purd. Dig. 448, pl. 116. This was the ancient practice. See *McCormick v. Meason*, S. & R. 99.

Court of Philadelphia of a deed for land sold under process issued out of the Common Pleas is void and passes no title to the purchaser.<sup>1</sup>

A sheriff's deed must be acknowledged in open court to render it valid against a *bona fide* purchaser without notice either actual or constructive.<sup>2</sup>

*By whom the acknowledgment is to be made.*—In general the acknowledgment is to be made by the sheriff who sold the land. And our practice is that he should himself execute the deed and make the acknowledgment;<sup>3</sup> though it seems these acts may be done by deputies.<sup>4</sup>

But where the sheriff who made the sale goes out of office or dies before executing and acknowledging the deed, it might be a question who should perfect the title. In the case of a deed executed but not acknowledged by the old sheriff, the proper course under the Act of 1764<sup>5</sup> was held to be to apply for an order to have a new deed executed and acknowledged by the sheriff for the time being, as the latter could not acknowledge the former deed, which was not in fact his own act. But it has been the common practice to have the ex-sheriff acknowledge a deed which he had executed while in office.<sup>6</sup> And this has been recognised on argument in the District Court of Philadelphia.<sup>7</sup> So a deed defectively acknowledged, might be reacknowledged by the old sheriff after he was out of office.<sup>8</sup>

But now, by the Act of 1836, if the sheriff or other officer goes out of office after levy and before sale, his successor shall complete the proceedings, and execute and acknowledge the deed with the same effect as if it had been done by the officer who made the levy.<sup>9</sup> The proper practice is for the old sheriff to hand over to his successor, without deed, the unexecuted process, when it becomes the duty of the latter to execute it; and where a *vend. exp.* was directed to a sheriff who was going out of office, and it appeared that both the old and new sheriff were present at the sale, and the deed, which was made by the latter, recited a sale by the former sheriff, and the writ, which had never been returned, was found among the papers of the old sheriff, it was held that the deed was not void, though under some circumstances voidable; and in this case the purchase-money having been paid, and the debtor having accepted a lease of the premises from the purchaser, it was held that he was estopped from making the objection.<sup>10</sup>

In the second place, the act provides that if the sheriff, after having sold the land, goes out of office before executing and acknowledging a deed, the Supreme Court, or the court where the judgment was obtained, upon petition of the plaintiff or purchaser, setting forth specially the facts of the case, may, by an order to be entered upon the records of the court, direct the sheriff for the time

<sup>1</sup> DeHaven's Appeal, 2 Wright 373.

<sup>2</sup> Bellas v. McCarty, 10 Watts 30; Patterson v. Stewart, Ibid. 472; Robb v. Ankeny, 4 W. & S. 129.

<sup>3</sup> Act 16th June 1836, § 94, Purd. Dig. 448, pl. 114, Pamph. L. 778.

<sup>4</sup> 10 Johns. 223.

<sup>5</sup> Sect. 2, 1 Sm. Laws 263. Substan-

tially re-enacted by Act of 16th June 1836, §§ 102, 103.

<sup>6</sup> Woods v. Lane, 2 S. & R. 55.

<sup>7</sup> Stanley et al., November 1826, MS.

<sup>8</sup> Adams v. Thomas, 6 Binn. 254.

<sup>9</sup> Act 16th June 1836, § 101, Purd. Dig. 449, pl. 121, Pamph. L. 780.

<sup>10</sup> Leshey v. Gardner, 3 W. & S. 314.

being to execute the deed;<sup>1</sup> and on receiving such order, the officer, after payment of the purchase-money, with whatever costs and charges remain unpaid, must execute, deliver, and acknowledge the deed, and do such other acts in reference to the matter as the former officer might or should have done; and such deed will be as effectual in law as if the title had been completed by the former officer.<sup>2</sup> And the courts have the same powers to perfect the title of purchasers in cases of *defective* or *informal* execution of deeds by sheriffs or coroners.<sup>3</sup> After the acknowledgment has been made, it is immaterial that the petition was endorsed with a wrong year, where the entries on the docket and the recitals in the deed correspond, and are regular; and it is immaterial that the petition contained no description of the property sold, except the name of the former owner.<sup>4</sup> The court will not order a succeeding sheriff to execute a deed where the transaction is stale, as where, more than twenty years after the sale, no proof of payment of the purchase-money or of the perfection of the sale appears, and there are *terre-tenants* purchasers for value without notice of the proceedings.<sup>5</sup> A recital in the deed that the sale was made by the former sheriff is not conclusive evidence of the fact; but the party may show *aliunde* that it was in fact made by the same sheriff who executed the deed.<sup>6</sup> The order of the court directing the sheriff to execute a deed, must be proved to have been made;<sup>7</sup> its existence will not be presumed from the acknowledgment of the deed by the succeeding sheriff.<sup>8</sup>

On a motion for an order that the sheriff may perfect the title to lands sold by the late sheriff, the court refused to inquire whether the judgment had been unfairly obtained, but left the question to be tried in an ejectment.<sup>9</sup>

*Defective or informal return, deed, execution, or acknowledgment.*—In case the sheriff after the sale has made a *defective* or *informal* return to the writ, the purchaser or other interested party may apply to the court by bill or petition setting forth the facts of the case—due notice of which, in such manner as the court may direct, is to be given to the purchaser or defendant, or the personal representatives, heirs, or devisees of such party and all other persons interested, to appear on a day certain to be fixed by the court and answer the bill or petition; whereupon the court may examine into the facts of the case, and make such order or decree as justice and equity may require, by dismissing the application, or by correcting the return and directing the sheriff for the time being to execute and acknowledge, in the usual way, a deed to the proper person, which deed will be as effectual in law as if the proper return had

<sup>1</sup> Act 16th June 1836, § 102, *Purd.* Dig. 449, pl. 122, *Pamph.* L. 780.

<sup>2</sup> Act 16th June 1836, § 103, *Purd.* Dig. 449, pl. 123, *Pamph.* L. 780. Sections 102 and 103 are taken from the Act of 23d March 1764, § 2 (1 *Dallas* 440, 1 *Bioren* 404, 1 *Sm. Laws* 263), which was substantially re-enacted 2d April 1803, § 1 (7 *Bioren* 151).

<sup>3</sup> *Ibid.*, § 104. Taken from the Act

of 3d May 1832, § 1, *Pamph.* L. 404. But the phraseology of the earlier act is "deeds defectively executed or acknowledged."

<sup>4</sup> *Woods v. Halsey*, 9 *Barr* 144.

<sup>5</sup> *Richards v. Dutot*, 7 *Barr* 430.

<sup>6</sup> *Lesbey v. Gardner*, 3 *W. & S.* 314.

<sup>7</sup> *Woods v. Lane*, 2 *S. & R.* 53.

<sup>8</sup> *Seechrist v. Baskin*, 7 *W. & S.* 403.

<sup>9</sup> *Field v. Earle*, 4 *S. & R.* 82.



been made, and the title had been completed according to law.<sup>1</sup> The sheriff cannot be *compelled* to alter his return as to *matter of fact*, but may do so on leave given by the court.<sup>2</sup> And this leave is important to him, as he may be liable to an action in case of a false return. If, at the instance of plaintiff's attorney, he return the land unsold for want of buyers, on account of the purchaser's delaying payment, and upon a second *levari* he sells to the plaintiff, the court may before the deed is acknowledged confirm the first and set aside the second sale; they do not exceed their powers in making an order for the amendment of the return to the first writ and confirming the sale.<sup>3</sup> So, where through a clerical mistake the sheriff returned that he had sold to *John L.*, and the deed was made and acknowledged accordingly, when the real name of the purchaser was *Joseph L.*, the court, on being satisfied of the fact, permitted the deed and return to be amended according to the truth, and directed the sheriff to reacknowledge the deed;<sup>4</sup> and so where there had been an entry under the deed, it would be competent for the court to amend the record by making a registry of the acknowledgment, though this would in no case be permitted without saving the rights of third persons.<sup>5</sup>

Where the execution of the deed is *defective* or *informal*, the court has power to compel the officer who made the sale to perfect the title of the purchaser in the same manner, and upon the like terms and conditions, as are provided for the case of his going out of office without executing a deed.<sup>6</sup> A deed defectively acknowledged might be reacknowledged by the old sheriff after he was out of office.<sup>7</sup> On a motion that the sheriff perfect the title in a sale made by his predecessor, the court will not inquire into the fairness of the original judgment, because those who complain against it have it in their power to try it in an ejectment.<sup>8</sup> If the purchaser have accepted the deed without objection, he cannot when sued for the purchase-money object that the acknowledgment was defective.<sup>9</sup>

*Time of acknowledgment.*—As the sheriff is not bound to return the writ before the return day, and cannot be ruled to do so, and as exceptions to sheriff's sales cannot be made before, the acknowledgment cannot be taken prior to the return day; and a premature acknowledgment is a nullity.<sup>10</sup> But the court refused to interfere on the application of a second mortgagee after such an acknowledgment.<sup>11</sup> It must be made at a time appointed by the court for the purpose, or after notice previously affixed in the prothonotary's office, specifying the names of the parties to the execution, the name of the purchaser, and the time at which the acknowledgment is

<sup>1</sup> Act 21st April 1846, § 1, *Purd. Dig.* 449, pl. 125, *Pamph. L.* 430. For the form of such petitions, see *Smith's Forms* 387, pl. 37, 388, pl. 38, 389, pl. 39.

<sup>2</sup> *Ante*, Sect. I., "Return."

<sup>3</sup> *Vastine v. Fury*, 2 S. & R. 426.

<sup>4</sup> *Rapin v. Dealy*, 1 Miles 339.

<sup>5</sup> *Bellas v. McCarty*, 10 Watts 31, per *ROGERS, J.*

<sup>6</sup> Act of 16th June 1836, § 104, *Purd. Dig.* 449, pl. 124, *Pamph. L.* 780.

<sup>7</sup> *Adams v. Thomas*, 6 Binn. 254.

<sup>8</sup> *Field v. Earle*, 4 S. & R. 82.

<sup>9</sup> *Scott v. Greenough*, 7 S. & R. 199.

<sup>10</sup> *Lessee of Murphy v. McCleary*, 3 Yeates 406; *Lessee of Glancey v. Jones* 4 Yeates 214.

<sup>11</sup> *Solomon v. Parnell*, 2 Miles 264.

intended to be made, at least one week after the return day.<sup>1</sup> And where it is made in another court than that from which the execution issued, it must also appear that notice, in the manner provided for the service of the summons in personal actions, has been given to the parties to the writ;<sup>2</sup> but when made in another court it may be made before the return day.<sup>3</sup>

In Philadelphia, the acknowledgment may be made in the District Court on the first Monday of each term, and the Saturday of each week;<sup>4</sup> in the Common Pleas, on each Saturday of the term;<sup>5</sup> and in the Nisi Prius, on the Saturday of each week when there is a Court of Nisi Prius or Supreme Court being held, or on any Saturday to which it may be adjourned.<sup>6</sup>

But where a sheriff's deed was duly acknowledged, the court refused to interfere on the application of a second mortgagee, although the acknowledgment had been made before the return of the writ, and the ten days' notice required by law had not been given.<sup>7</sup> In the courts of Philadelphia, before the acknowledgment can be made, the process must have been duly returned and filed with the prothonotary.<sup>8</sup> Where the defendant moved to set aside the sale, under which no action was taken, the court, after twenty years, refused to direct a deed to be acknowledged, there being no proof of payment of the purchase-money, and there being intermediate *terre-tenants* for value without notice.<sup>9</sup>

*Manner and form of acknowledgment.*—It must be made upon public proclamation in open court,<sup>10</sup> at a time appointed by the court for the purpose, or notice shall have been previously affixed in the office of the prothonotary specifying the names of the parties and of the purchaser, and the time at which the acknowledgment is intended to be made at least one week after the return day of the execution; and in case of acknowledgment made in another court than the one from which the execution issued, notice must appear to have been given to the parties in the execution in the manner provided for the service of the summons in personal actions.<sup>11</sup> The provisions of the act upon this subject are directory, and after acknowledgment and delivery of the deed to the purchaser it will be presumed that they have been complied with.<sup>12</sup> At any rate, one who was a party to the sale, and confirmed it by taking his share of the proceeds out of court, cannot allege that the deed was defectively acknowledged and inoperative.<sup>13</sup>

*How the acknowledgment is proved.*—It is a judicial act of the court, which must appear of record, and cannot be proved by parol evidence in a collateral proceeding, whether by witnesses present in

<sup>1</sup> Act of 16th June 1836, § 97, Purd. Dig. 448, pl. 117, Pamph. L. 778.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid., § 98, Purd. Dig. 448, pl. 118.

<sup>4</sup> D. C., Rule LXXX.

<sup>5</sup> C. P., Rule XXXII., § 1.

<sup>6</sup> S. C. N. P., Rule XXII.

<sup>7</sup> Solomon v. Parnell, 2 Miles 264.

<sup>8</sup> Rules C. P. XXXI., § 3; D. C., LXXIX.; S. C. N. P., XXII.

<sup>9</sup> Richards v. Dutot, 7 Barr 431.

<sup>10</sup> Woods v. Lane, 2 S. & R. 55; Bel-las v. McCarty, 10 Watts 30; Patterson v. Stewart, Ibid. 472; Robb v. Ankeny, 4 W. & S. 129.

<sup>11</sup> Act 16th June 1836, § 97, Purd. 448, pl. 117.

<sup>12</sup> Stroble v. Smith, 8 Watts 280.

<sup>13</sup> Ibid.

court at the time of the acknowledgment, by witnesses who saw the entry of the acknowledgment on the deed, or by the production of the deed itself, with an acknowledgment on the back, where no registry has been made of it in court.<sup>1</sup> But the certificate of the prothonotary to the acknowledgment, though not under seal of office, is sufficient evidence of the acknowledgment, although no other record was made at the time;<sup>2</sup> but this will not affect a *bond fide* holder or purchaser, without notice, actual or constructive, of the execution of the sheriff's deed.<sup>3</sup> In Alleghany county, all sheriff's deeds to *bond fide* purchasers heretofore made and acknowledged in open court, are made valid notwithstanding informalities in setting forth the particulars of such acknowledgment, or omission of the prothonotary duly to certify the same according to law.<sup>4</sup> This provision has since been extended to Erie county.<sup>5</sup>

*Effect of the acknowledgment.*—Generally speaking, the deed is not complete, and cannot be recorded or given in evidence, until it is acknowledged;<sup>6</sup> and to give the purchaser the right to notify the tenant to remove, under the Act of 1802, or to grant a lease, the acknowledgment was essential.<sup>7</sup> An acknowledgment is necessary to enable the purchaser to maintain ejectment.<sup>8</sup> But, when acknowledged, it relates back to the time of its execution, and the legal title vests in the grantee from that time, and the equitable title from the time of sale, if he paid his money according to the terms of sale.<sup>9</sup> Yet, by the purchase, the sheriff's vendee acquires an interest in the land, although the deed may not have been acknowledged, which descends to his heirs, and may be bound by a judgment or taken in execution.<sup>10</sup> The acknowledgment and registry of the deed in the prothonotary's office, are equivalent to recording it in the office of the recorder of deeds, as notice to a subsequent purchaser from the defendant in the execution.<sup>11</sup> The acknowledgment is not conclusive evidence of delivery, but in connection with the fact of possession by the vendee it is strong proof of it.<sup>12</sup>

The most important effect of the acknowledgment is to cure all defects of the process or its execution which the court has power to act upon;<sup>13</sup> all mere irregularities however gross,<sup>14</sup> such as the want

<sup>1</sup> *Bellas v. McCarty*, 10 Watts 13. See opinions of ROGERS, J., and KENNEDY, J. *Patterson v. Stewart*, Ibid. 472; *Robb v. Ankeny*, 4 W. & S. 128.

<sup>2</sup> Act of 4th April 1844, § 1, *Purd. Dig.* 449, pl. 126, *Pamph. L.* 188; *Wilson v. Howser*, 2 Jones 116. See *Foust v. Ross*, 1 W. & S. 501.

<sup>3</sup> Act 4th April 1844, § 1, *ubi supra*. The Act of 5th April 1842, § 12, *Pamph. L.* 244, is identical with the Act of 4th April 1844, § 1, except that the words "although not under seal of office" are omitted.

<sup>4</sup> Act 10th April 1848, § 10, *Purd. Dig.* 449, pl. 127, *Pamph. L.* 450.

<sup>5</sup> Act 11th March 1853, § 14, *Pamph. L.* 167.

<sup>6</sup> *Hawk v. Stouch*, 5 S. & R. 161; *Duncan v. Robeson*, 2 Yeates 454;

*Moorhead v. Pearce*, Ibid. 456.

<sup>7</sup> *Hawk v. Stouch*, 5 S. & R. 161; *Hall v. Benner*, 1 Pa. R. 402.

<sup>8</sup> Case of Eleventh Street, Quarter Sess., Phila., April 1823, MS.

<sup>9</sup> 3 *Griff. L. R.* 251; *Wallace v. Lawrence*, 1 W. C. C. R. 503.

<sup>10</sup> *Bellas v. McCarty*, 10 Watts 21; *Morrison v. Wurtz*, 7 Watts 437; *Stephens's Appeal*, 8 W. & S. 188.

<sup>11</sup> *Naglee v. Albright*, 4 Whart. 291; *McCormick v. Meason*, 1 S. & R. 96; *Feger v. Keefer*, 6 Watts 298.

<sup>12</sup> *Hartman v. Stahl*, 2 Pa. R. 231.

<sup>13</sup> *Thompson v. Phillips*, 1 Bald. 246. See *Braddee v. Brownfield*, 2 W. & S. 288, *Huston, J.*; *Cash v. Tozer*, 1 W. & S. 529.

<sup>14</sup> *Blair v. Greenway*, 1 Browne 219; *Shields v. Miltenberger*, 2 Harris 76;

of an appraisement;<sup>1</sup> or erroneous action on the part of the jury;<sup>2</sup> or the absence of a regular condemnation, or of the waiver of inquisition;<sup>3</sup> or omission to give notice of the inquisition;<sup>4</sup> or that the last inquisition was held by the successor in office of the sheriff who held the first, or that the second inquisition was held after the return of the *fi. fa.*;<sup>5</sup> or the issuing of the *fi. fa.* and *vend. exp.* on the same day and to the same term;<sup>6</sup> or that the return to the *fi. fa.* did not show that the defendant had no personal estate;<sup>7</sup> or the absence of a *sci. fa. quare ex. non*;<sup>8</sup> or that the sale was made after the return day by adjournment;<sup>9</sup> though this is denied;<sup>10</sup> or misdescription of the property in the advertisements and inadequacy of price:<sup>11</sup> so, where the deed recited the sale to have been made under a *vend. exp.*, the acknowledgment cures the omission to return the *vend. exp.*<sup>12</sup> So, where land extended under a *fi. fa.* is sold under an *alias fi. fa.*, issued without leave on the same judgment, the acknowledgment cures the irregularity.<sup>13</sup> So the acknowledgment cures an omission, in proceedings to sell land lying in two counties, to file the docket entry and proceedings, and to enter a copy of the proceedings subsequent to the inquisition in the adjoining county.<sup>14</sup> And after seventeen years from the acknowledgment the court will presume that a certificate of the justice, that execution has been issued before him and returned "*nulla bona*," was produced to the prothonotary before he issued the *fi. fa.* on the transcript, although such certificate is neither on file nor noted on the docket, or proved to have ever been in existence;<sup>15</sup> and upon the trial of an ejectment by the sheriff's vendee, the court will not inquire into the formality of the proceedings on which the sale was founded.<sup>16</sup> If the sheriff has behaved improperly the remedy of the party injured, after the acknowledgment, is confined to the sheriff.<sup>17</sup>

By returning the sale and acknowledging the deed, the sheriff becomes fixed for the amount bid, and the title to the land is vested in the purchaser.<sup>18</sup>

But the acknowledgment is not such a *res adjudicata* as precludes an inquiry into the legality of the proceedings by which the sale was made.<sup>19</sup> And the absence of authority, or the presence of fraud, utterly frustrates the operation of a sheriff's sale, as a means of

McFee v. Harris, 1 Casey 102. See Stroble v. Smith, 8 Watts 280; Springer v. Brown, 9 Barr 305.

<sup>1</sup> Crowell v. Meconkey, 5 Barr 168.

<sup>2</sup> Murphy v. McCleary, 3 Yeates 405.

<sup>3</sup> Spragg v. Shriver, 1 Casey 282.

<sup>4</sup> Meanor v. Hamilton, 3 Casey 137.

<sup>5</sup> Elliott v. McGowan, 10 Harris 198.

<sup>6</sup> Hadden v. Clark, 2 Grant 107.

<sup>7</sup> Cooper v. Galbraith, 3 W. C. C. R. 546.

<sup>8</sup> Hinds v. Scott, 1 Jones 27; Vastine v. Fury, 2 S. & R. 430.

<sup>9</sup> Stroble v. Smith, 8 Watts 280. But see *contrâ*, Cash v. Tozer, 1 W. & S. 519; Dale v. Medcalf, 9 Barr 108.

<sup>10</sup> Cash v. Tozer, 1 W. & S. 519; Dale

v. Medcalf, 9 Barr 108.

<sup>11</sup> Murphy v. McCleary, 3 Yeates 405; Mott v. Clark, 9 Barr 400; Chadwick v. Patterson, D. C. Phila., 2 Phila. Rep. 275. And see *ante*, 998.

<sup>12</sup> Gibson v. Winslow, 2 Wright 49; Hinds v. Scott, 1 Jones 26.

<sup>13</sup> Wilson v. Howser, 2 Jones 109.

<sup>14</sup> Elliott v. McGowan, 10 Harris 198.

<sup>15</sup> Laughlin v. Bunting, S. Ct., 1 Am. L. J. 271.

<sup>16</sup> Young v. Taylor, 2 Binn. 227.

<sup>17</sup> McCulloch's Case, 1 Yeates 40.

<sup>18</sup> Hartman v. Stahl, 2 Pa. R. 223.

<sup>19</sup> Braddee v. Brownfield, 2 W. & S. 271; Dawson v. Morris, 4 Yeates 341; Cash v. Tozer, 1 W. & S. 529.

transmission of title, and may be insisted on after acknowledgment.<sup>1</sup> But it is said to be exceedingly doubtful whether the court have any power over the deed after the acknowledgment, though they have set aside the sale on application of the purchaser where he produced the deed and delivered it up to be cancelled; and they may interfere in case of fraud, but even then perhaps the injured parties should be left to their remedies.<sup>2</sup>

The claimant under a sheriff's deed must show the authority upon which the sale was made: it is not sufficient to show authority to sell in the predecessor of the sheriff who conveys, unless accompanied by the record of the special order of the court, founded on the statute authorizing the sheriff's successor to convey; the existence of such an order is not to be inferred from the acknowledgment of the deed by the succeeding sheriff.<sup>3</sup> The acknowledgment is not conclusive evidence of delivery, but taken in connection with the fact of possession of the land being taken by the vendee, and continued, it is a strong proof of it.<sup>4</sup>

But where the deed though acknowledged still remains in the sheriff's hands, the acknowledgment is no bar to setting aside the sale for adequate cause.<sup>5</sup>

Where the sheriff returned the property unsold on account of the refusal of purchaser to pay, a deed to such purchaser, acknowledged within less than a year, and stating the payment of the consideration being the amount of the bid, though not having a separate receipt for the money, is *prima facie* evidence of the payment of the purchase-money, and of a valid title to the land.<sup>6</sup>

And a deed acknowledged after the commencement of an ejectment is evidence for the defendant, when the sale was prior to the action.<sup>7</sup>

*Opposing the acknowledgment.*—Hence it follows that irregularities in executing the process must be taken advantage of before the sheriff's deed is acknowledged, which takes place as a matter of course, at the term to which the process was returnable, unless good ground be shown against it.

If the sale has been made under void or irregular process, the court will not permit the sheriff to acknowledge the deed.<sup>8</sup> And in general where cause of complaint exists, the party applies to the court before the deed is acknowledged, and the acknowledgment is

<sup>1</sup> *Shields v. Miltenberger*, 2 Harris 76. Hence the necessity of producing the judgment and writ before offering the deed in evidence: *Wilson v. McVeagh*, 2 Yeates 86; *Weyand v. Tipton*, 5 S. & R. 332; *Hamilton v. Speckenagle*, 9 S. & R. 212; *Porter v. Neelan*, 4 Yeates 108; s. c., 1 Peters C. C. R. 67. Though now, if the record be recited in the deed and certified by the prothonotary, it need not be produced: Act 16th June 1836, § 95. See *ante*, p. 1019, "Recitals in the Deed."

<sup>2</sup> *Chadwick v. Patterson*, D. C. Phila.,

2 Phila. Rep. 275. See the cases as to the curative effect of the acknowledgment collected in the opinion by BELL, J., in *Shields v. Miltenberger*, 2 Harris 77.

<sup>3</sup> *Seechrist v. Baskin*, 7 W. & S. 403.

<sup>4</sup> *Hartman v. Stahl*, 2 Pa. R. 223.

<sup>5</sup> *Vanernan v. Cooper*, D. C. All., 2 Am. L. J. 265; *Stephens v. Stephens*, D. C. All., 1 Phila. Rep. 108.

<sup>6</sup> *Foster v. Gray*, 10 Harris 9.

<sup>7</sup> *Smith v. Grim*, 2 Casey 95.

<sup>8</sup> *Young v. Taylor*, 2 Binn. 218.

there suspended until the matter is decided.<sup>1</sup> A writ issued several years after judgment without a previous *scire fa. quare ex. non* is voidable but not void, the sheriff is authorized to sell under it, and the objection cannot be taken after acknowledgment.<sup>2</sup>

The parties to the execution may oppose the acknowledgment:<sup>3</sup> so may judgment-creditors of defendant.<sup>4</sup>

The confirming or setting aside the sale, and taking the acknowledgment, are matters entirely within the discretion of the court below, and cannot be reviewed by the Supreme Court.<sup>5</sup>

*Acknowledgment where a lien-creditor becomes purchaser.*—As we shall presently see, a lien-creditor who purchases at the sale is permitted to deliver to the sheriff his receipt for so much as he appears from the record to be entitled to, in lieu of so much money.<sup>6</sup> In such case it may happen that a person interested in the proceeds may wish to contest the validity of the lien of the purchaser. This question can be raised by opposing the acknowledgment of the sheriff's deed. The rules of the District Court of Philadelphia upon this subject embody a system of practice which may be useful as a guide to the practitioner in other courts; they will be explained hereafter.<sup>7</sup>

*Of the receipt of the money by the sheriff, and his disposition of it.*

*Of the sheriff's receipt of the money.*—The sheriff is not bound to acknowledge his deed before he demands the money, for it may be that the purchaser will not pay, and in that case the sheriff has a right to put up the land to sale again, or to return that it remains unsold. The purchaser runs no risk in paying the money and accepting the deed before its acknowledgment, because the court will compel the sheriff to make the acknowledgment.<sup>8</sup> In a suit therefore against the purchaser for the purchase-money it is not necessary to aver a tender of a deed acknowledged; and it is said that unless other conditions are specified, it is a cash sale, and the delivery of the deed is an act subsequent to the payment of the money.<sup>9</sup> But this has since been qualified, and it now seems that in ordinary cases there is no reason to justify a sheriff in demanding the money before he can give a title, or the purchaser can get possession: unless a bidder is notoriously insolvent the sheriff cannot make a return, long before the return day, that the purchaser has not paid and therefore unsold; and when he does so, and has made no demand, and has no evidence to justify his course, the bidder is not liable for the difference in price at a second sale.<sup>10</sup> But after the return day the sheriff may maintain an action against the bidder, for the amount of his bid, without having first tendered

<sup>1</sup> Woods v. Lane, 2 S. & R. 55.

<sup>2</sup> Vastine v. Fury, 2 S. & R. 430.

<sup>3</sup> See Act 16th June 1836, § 97, Purd. Dig. 448, pl. 117, Pamph. L. 778.

<sup>4</sup> Cash v. Tozer, 1 W. & S. 528. See Watson v. Willard, 9 Barr 95; Shields v. Kuhn, ante, 1009, n. 5.

<sup>5</sup> Sloan's Case, 8 Watts 194.

<sup>6</sup> Act 20th April 1846, § 1. Purd.

Dig. 446, pl. 100, Pamph. L. 411. See post.

<sup>7</sup> Rule LXXXI., Walker's Rules 29. See post, 1033, "Where a Lien Creditor becomes the Purchaser."

<sup>8</sup> Scott v. Greenough, 7 S. & R. 199.

<sup>9</sup> Negley v. Stewart, 10 S. & R. 207.

<sup>10</sup> Holdship v. Doran, 2 Pa. R. 17.

him a deed.<sup>1</sup> By acknowledging the deed the sheriff fixes himself for the price, which is thenceforth a matter between him and the purchaser.<sup>2</sup>

The purchaser, after accepting a deed acknowledged and keeping possession of it without objection, cannot resist payment of the purchase-money on the ground of a defect in the deed.<sup>3</sup> Neither can he object to receive the deed, and refuse payment of the purchase-money, on the ground of a defect of title, where the sale was fairly made: he buys on his own knowledge and judgment, and the maxim *caveat emptor* applies to judicial sales.<sup>4</sup> Especially if he had direct notice of the adverse title at the time of the sheriff's sale.<sup>5</sup> Lands are frequently sold greatly below their value, because the usual understanding is that the purchaser takes his chance of the title.<sup>6</sup> So the existence of encumbrances of which the purchaser had no notice at the sale, and even a mistaken assertion by the sheriff that there were no encumbrances, will not discharge the purchaser from his liability.<sup>7</sup> This is, however, not to be understood as preventing the purchaser from applying in time to have the sale set aside under such circumstances, but only that if he does not take this course he cannot make the objection afterwards.<sup>8</sup>

*Interest.*—Where the purchaser, a judgment-creditor of defendant, who was ultimately decreed to be entitled to the proceeds, gave his bond to the sheriff for the purchase-money, the sheriff was not entitled to recover interest.<sup>9</sup> And where the bond of a purchaser has been deposited in court, by consent of creditors, in lieu of the purchase-money as cash, it does not bear interest.<sup>10</sup>

The sheriff is not bound for interest on the price received by him until after demand made of him; and a rule on him to pay the money into court, where there was a dispute among the execution-creditors about their several rights to it, and a delay for several years after that, during which the dispute existed, cannot be regarded as equivalent to a demand, even though he does not account for the disposition of the money in the mean time.<sup>11</sup>

Where a lien-creditor becomes the purchaser, instead of paying the whole amount of his bid in money he is permitted to deliver to the sheriff his receipt for so much as he appears from the record to be entitled to receive.<sup>12</sup> A form of such receipt is given by Smith.<sup>13</sup> This only applies to persons having a lien on the land as distinguished from a right in or title to the land itself;<sup>14</sup> but the sheriff may, at his own risk, accept the receipt of an owner, who has purchased at the sheriff's sale, for the balance remaining after the dis-

<sup>1</sup> *Holdship v. Doran*, 2 Pa. R. 17. And see the opinion in this case for a full discussion of the conflicting decisions and dicta.

<sup>2</sup> *Hinds v. Scott*, 1 Jones 27.

<sup>3</sup> *Scott v. Greenough*, 7 S. & R. 199.

<sup>4</sup> *Wood v. Lewis*, 2 Harris 9; *Allen v. Gault*, 3 Casey 473.

<sup>5</sup> *Friedly v. Scheetz*, 9 S. & R. 156.

<sup>6</sup> *Smith v. Painter*, 5 S. & R. 225.

<sup>7</sup> *Wood v. Lewis*, 2 Harris 9.

<sup>8</sup> See *ante*, 1010. And see *Crawford*

*v. Boyer*, 2 Harris 380.

<sup>9</sup> *Gardner v. Klinefelter*, 9 W & S. 59.

<sup>10</sup> *Oliphant v. Frost*, 9 Barr 308.

<sup>11</sup> *Hantz v. The York Bank*, 9 Harris 291.

<sup>12</sup> Act 20th April 1846, § 1, *Purd. Dig.* 446, pl. 100, *Pamph. L.* 411.

<sup>13</sup> *Smith's Forms* 385, pl. 33.

<sup>14</sup> *Gault v. Telford*, D. C. Phila., 19 Leg. Int. 37; *Brinkle v. Wagner*, D. C. Phila., 21 Leg. Int. 356.

charge of all liens.<sup>1</sup> But where a mortgage is the first lien, and the land sold under a junior judgment, is purchased by the mortgagee, the latter has no right to a deed from the sheriff on crediting the amount of his bid in satisfaction of the mortgage, where there was no stipulation in the conditions of sale that the mortgage should be discharged by the sale, nor any arrangement to that effect with the sheriff.<sup>2</sup>

The purchaser tendering such receipt to the sheriff must produce a duly certified statement from the proper records, under the hand and official seal of the proper officer, showing that he is a lien-creditor entitled to receive some part of the proceeds of the sale, and he must at all events pay a sufficient amount of money to cover all legal costs which may be payable out of the proceeds.<sup>3</sup> The sheriff when he has accepted such a receipt must state the fact in his return, and attach thereto a list of the liens upon the property sold, and such return must be read in open court, on some day during the term to be fixed by the order of court; and if the purchaser's right to the money is questioned by any person interested, the court must appoint an auditor, who, after due notice to parties interested, given in such manner as the court may direct, shall make a report, to be approved by the court, distributing the proceeds of the sale, with the facts and reasons upon which such distribution is made.<sup>4</sup> The form of such return may be found in Smith.<sup>5</sup> If he report the exceptions to be unfounded, the exceptant may be made to pay the costs of the audit, unless he satisfies the court that he had probable cause to object to the return.<sup>6</sup> Or the court may direct an issue to determine the validity of the purchaser's lien, pending which all proceedings will be stayed; and if it is determined that the purchaser is not entitled to receive the money, the court must set aside the sale, and direct the land to be resold, unless within ten days the money is paid to the sheriff: and in case of a second sale the former purchaser will be liable for any deficiency: but before an issue will be awarded, the applicant must make affidavit that there are material facts in dispute, and must set forth their nature and character, upon which the court will determine whether the issue should be granted, subject to a writ of error or an appeal by the applicant if it is refused as in other cases.<sup>7</sup> The form of such application is given by Smith.<sup>8</sup> The right of the purchaser can only be contested by lien-creditors; they only are "persons interested" within the meaning of the act: hence it was not error in the court to refuse to grant an issue, or appoint an auditor at the instance of the defendant who wished to set up a breach of agreement by the original vendor of the property (the sheriff's sale having been under a judgment for purchase-money

<sup>1</sup> Gault v. Telford, *ubi supra*.

<sup>2</sup> Crawford v. Boyer, 2 Harris 380.

<sup>3</sup> Act 20th April 1846, § 1, *vide supra*.

<sup>4</sup> *Ibid.*, § 2, *Purd. Dig.* 446, pl. 101, *Pamph. L.* 411. The order of the court to credit the purchaser with the amount of his judgment, is not *conclusive* evi-

dence of the fairness of his judgment: *Martin v. Gernandt*, 7 Harris 124.

<sup>5</sup> Smith's Forms 385, 34.

<sup>6</sup> Larimer's Appeal, 10 Harris 41. And see *Ibid.*, "What is not Probable Cause."

<sup>7</sup> Act 20th April 1846, § 2, *ubi supra*.

<sup>8</sup> Smith's Forms 385, pl. 35.



assigned to the plaintiff), in order to share in the proceeds to the extent of his damages.<sup>1</sup>

If the exceptants have complied with the terms of the law by setting out in their affidavit that material facts are in dispute, and stating their nature and character, the court have no power to refuse an issue.<sup>2</sup> But it is not sufficient to charge that there are disputed facts without stating what they are; the affiant should at least, to the best of his knowledge and belief, allege the existence of certain facts material to the question, and that the truth of these facts is disputed by other persons, or that certain facts are alleged by the other party, which, to the best of his knowledge and belief, do not exist, and are disputed by him.<sup>3</sup> The provision of the act requiring an affidavit to accompany the demand for an issue is held to be general, and not confined to the single case of lien-creditors becoming purchasers.<sup>4</sup> It will therefore be discussed hereafter, in connection with the practice in feigned issues in the distribution of the proceeds of sheriff's sales.<sup>5</sup>

Upon granting the issue the court, as soon as the money has been paid into court, may, at their discretion, upon the application of parties appearing from the record to be entitled to the fund, order the money to be invested *pendente lite*, subject to their decree, in United States debt, or other sufficient security.<sup>6</sup>

*The rules of the District Court of Philadelphia* may be of use even to the practitioner in other courts, and are here given in substance. They provide: 1. The return of the sheriff mentioned in the 2d section of the Act of 1846, is to be read in open court on the Saturday following the day on which it is made.<sup>7</sup> 2. Any person interested in the proceeds may file exceptions to the right of the purchaser to any part of such proceeds; but such exceptions must be founded upon material facts in dispute, the nature and character of which must be set forth and verified by affidavit, or upon some matter of law appearing of record.<sup>8</sup> 3. Exceptions to the right of the purchaser to the proceeds may be filed in the prothonotary's office on or before the Wednesday following the day on which the return has been read, but not otherwise.<sup>9</sup> 4. After filing his exceptions, the party may enter of course in the prothonotary's office a rule upon the purchaser to show cause why the sale should not be set aside, returnable on the Saturday following the filing of the exceptions, of which rule he must forthwith give notice to the purchaser, or his attorney.<sup>10</sup> 5. On the return of the rule the court will appoint an auditor to make distribution of the proceeds, and report the same to the court, or will direct an issue to deter-

<sup>1</sup> Shaw's Appeal, 10 Wright 407.

<sup>2</sup> Lippincott v. Lippincott, D. C. Phila., 1 Phila. Rep. 396.

<sup>3</sup> Brinton v. Perry, D. C. Phila., 1 Phila. Rep. 436.

<sup>4</sup> Biddle v. King, D. C. Phila., 1 Phila. Rep. 394.

<sup>5</sup> *Vide post*, "Practice before Audit-

ors," "Feigned Issue."

<sup>6</sup> Act 20th April 1846, § 3, Purd. Dig. 446, pl. 102, Pamph. L. 411.

<sup>7</sup> Rule LXXXI., § 1, Walker's Rules 29.

<sup>8</sup> *Ibid.*, § 2.

<sup>9</sup> *Ibid.*, § 3.

<sup>10</sup> *Ibid.*, § 4.

mine the validity of the lien of the purchaser,<sup>1</sup> if the case require it, and thereupon stay all proceedings under the rule until the report of the auditor has been confirmed, or the issue has been determined; but if the exceptions are insufficient the court will dismiss them, and discharge the rule.<sup>2</sup> 6. The auditors' report is subject to the general rules relating to auditor's reports, and the party obtaining the verdict in the feigned issue may enter judgment thereon, according to the rules applicable to verdicts in other cases.<sup>3</sup> 7. If, by the report of the auditor, or by the verdict of the jury, it appears that the purchaser is not entitled to the proceeds, or a portion of them, the rule will become absolute of course, unless within ten days after the approval of the auditor's report, or after the party prevailing in the issue is entitled to enter judgment, the purchaser pays the sheriff the whole of the purchase-money, or so much of it as it is adjudged he is not entitled to retain.<sup>4</sup> 8. If no exceptions are filed, or if the exceptions are dismissed, the sheriff may acknowledge the deed on the Saturday after his return has been read, or on any subsequent day appointed for acknowledging sheriff's deeds, unless a motion is pending to set aside the sale for irregularity, or for some other cause.<sup>5</sup>

*Distribution by sheriff.*—The sheriff may, if he will, distribute the proceeds himself, but this is on his own responsibility.<sup>6</sup> His act is unofficial and informal, and in so doing he can neither be protected nor prejudiced by his office.<sup>7</sup> It is said that on account of the delay and expense attending the payment of the money into court, it ought not to be done where the officer sees his way clear, but where ignorance or doubt exists, or controversy is threatened, his safety lies in that course.<sup>8</sup>

The only evidence of judgment-liens the sheriff is bound to regard, in the absence of all other proof, is the judgment-docket; and if a prior judgment entered only on the appearance-docket is thus overlooked by the prothonotary in making his search, the creditor may look to him for the loss sustained by his omission to enter it on the judgment-docket.<sup>9</sup>

Where arrears of ground-rent were payable out of the proceeds, but the sheriff neglecting to pay them, distributed the funds to subsequent liens, he is personally liable for the amount, and cannot relieve himself by showing that one of the conditions of sale was that unless the bill for such arrears were presented before he parted with the money, the arrears were to be paid by the purchaser.<sup>10</sup> And in case he undertakes the distribution, he is bound, if it be possible, to give direct notice to the ground landlord.<sup>11</sup> And

<sup>1</sup> But the question whether the case shall be sent in the first instance to an auditor or to a jury, must be decided by the court, subject to the right of the parties subsequently on cause shown to take the whole matter from the hands of the auditor, and bring it before a jury: *White v. Lucas*, D. C. Phila., 4 Phila. Rep. 30.

<sup>2</sup> Rule LXXXI. § 5, *ubi supra*.

<sup>3</sup> *Ibid.* § 6.

<sup>4</sup> *Ibid.* § 7.

<sup>5</sup> *Ibid.* § 8.

<sup>6</sup> *Mather v. McMichael*, 1 Harris 303. See *Waterman v. Conyngham*, 1 P. C. C. 2.

<sup>7</sup> *McDonald v. Todd*, 1 Grant 17.

<sup>8</sup> *Mather v. McMichael*, 1 Harris 303, per *BELL*, J.

<sup>9</sup> *Mann's Appeal*, 1 Barr 24. See *Mehaffey's Appeal*, 7 W. & S. 201; *Bear v. Patterson*, 3 W. & S. 323.

<sup>10</sup> *Mather v. McMichael*, 1 Harris 301.

<sup>11</sup> *Ibid.*

where he does not run any risk of mispayment, he has no right to impose conditions, or take a promise to refund from a claimant to whom he pays part of the proceeds to which he appears from the record to be entitled, although it is alleged that the judgment so paid is defective from want of consideration, but proceedings to establish that fact not having been instituted by the junior judgment-creditors.<sup>1</sup> And where he has taken a refunding receipt from a claimant whom he has paid, and the other creditors afterwards recover the money from the sheriff, on the ground that the judgment paid was not a lien on the land sold, in an action on the receipt it is a good defence that the sheriff had purchased other land of the execution-defendant, on which the judgment in question was clearly a lien, and had agreed to pay it off as part of the consideration; in such suit the record of the former recovery against the sheriff is not conclusive against the defendant as to the rights of the other creditors, where he was not notified to appear and take defence.<sup>2</sup>

If the plaintiff in the execution, by falsely representing to the sheriff that his judgment is the first lien, procures the improper payment of the money to himself, it may be recovered back; and, if his attorney is his agent, fraud by him affects the principal.<sup>3</sup>

On a sale under a junior judgment, the plaintiff in a prior judgment is not bound to come and take the money; and if the sheriff distributes the proceeds without paying his lien, and the money goes to the case of the defendant by paying his other debts, the elder judgment will still be good against the defendant, though its lien is discharged.<sup>4</sup>

In the county of Alleghany, upon a sale of real estate under execution, the sheriff may report to the court a schedule of distribution, according to the liens certified to him by the proper officers, which schedule and list of liens are to be attached to the return; and the return is to be read in open court on some day in term, to be fixed by order of the court, and if the distribution is not questioned or disputed within such reasonable time as may be fixed by the court, it shall be final and conclusive, and the sheriff shall proceed to pay out the proceeds in accordance therewith, but if exception be made by any person interested, within such time, the court shall proceed to hear and determine the same in the usual manner.<sup>5</sup>

*Payment of money into court.*—From what has just been stated it appears that in all cases where there are conflicting claims to the fund, or where the sheriff is not perfectly satisfied that no difficulty can arise as to the person entitled to receive it, his only safe course is to bring it into court pursuant to the command of his writ. If he does this, his act is official, and puts an end to his responsibility.<sup>6</sup>

Any one having a claim against the fund may in general rule the sheriff to pay the money into court; and this course is also pursued where there is no dispute as to the right, but the sheriff refuses or

<sup>1</sup> *Lewis v. Rogers*, 4 Harris 18.

<sup>2</sup> *Morrison's Administrator v. Mullin*, 10 Casey 12.

<sup>3</sup> *McDonald v. Todd*, 1 Grant 17.

<sup>4</sup> *Strorble v. Cleaver*, S. Ct., 1 Am.

L. J. 74.

<sup>5</sup> Act 10th April 1862, § 1, *Purd. Dig.* 1275, pl. 1, Pamph. L. 364.

<sup>6</sup> *McDonald v. Todd*, 1 Grant 17.

delays to pay it over to the plaintiff; when it is in court an order will be given to the prothonotary to pay it over to the plaintiff, if no objection exists. The practice is not to order the money into court, except upon application of a lien-creditor who shows some reasonable ground to dispute the right of the execution-plaintiff.<sup>1</sup>

The money must be actually paid into the court in order to give the court jurisdiction over it. Without the actual grasp of the fund the court are powerless for its distribution.<sup>2</sup> And a decree distributing it while yet in the sheriff's hands, will afford no protection to the sheriff paying under it.<sup>3</sup> Nor will a feigned issue, before the money is in the court, or even collected by the sheriff, affect lien-creditors not parties to the issue.<sup>4</sup> But the objection must be taken before final decree, or the Supreme Court will not allow it on appeal.<sup>5</sup>

But where a party recovers a judgment in his own name, and the money is paid to him, another person claiming a portion of the sum recovered, cannot have his rights tried by moving the court to direct such portion to be paid to him, and that the judgment be marked for his use *pro tanto*: in such case the agreement of the parties to consider the money in court, for the purpose of the motion, would not confer jurisdiction upon the court to decide the matter in that way, nor would the fact of the money being actually in court alter the case: such case bears no analogy to a proceeding to distribute the proceeds of a sheriff's sale; in the latter case the evidence comes up with the record, and an appeal is expressly given by Act of Assembly; in the former, the facts, whether proved or admitted, are not part of the record, and no appeal lies from the order of the court allowing or refusing the motion.<sup>6</sup>

Where a sheriff died after having deposited in bank, to his account as sheriff, the proceeds of an execution, his successor in office is the proper person to demand and receive the money from the bank, and the rule should be on the new sheriff to pay the money into court or to the plaintiff; the bank, being an outside party, was not subject to the summary jurisdiction of the court, and a rule on it to pay the money into court was null and void for want of jurisdiction, and might be restrained by injunction or reversed on appeal, or disregarded as incapable of execution.<sup>7</sup> So a prothonotary who has received money paid into court, and afterwards gone out of office, is beyond the summary jurisdiction of the court, and a rule upon him in reference to such money is null and void, and no writ of error lies thereon.<sup>8</sup> But the summary jurisdiction of the court in regard to former sheriffs and coroners may be exercised if application be made for the purpose within two years after the termination of their offices respectively.<sup>9</sup>

<sup>1</sup> *Stinson v. McEwen*, D. C. Phila., ante, p. 921, n. 3.

<sup>2</sup> *Williams's Appeal*, 9 Barr 267. See *Masser v. Dewart*, 10 Wright 534.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Troutman's Appeal*, 11 Harris 491.

<sup>5</sup> *Constine's Appeal*, 1 Grant 242.

<sup>6</sup> *Hudson's Appeal*, 3 Casey 46.

<sup>7</sup> *Allegheny Bank's Appeal*, 12 Wright 328.

<sup>8</sup> *Aurentz v. Porter*, 12 Wright 335.

<sup>9</sup> Act 16th June 1836, § 28, *Purd. Dig.* 189, pl. 6, *Pamph. L.* 793.

*Distribution of proceeds by the court.*

When the fund is in court it will be distributed among the lien-creditors entitled to it, according to the priority in date of their respective liens; except where a preference is given by Act of Assembly to claims of a particular kind. Before proceeding to explain the manner in which distribution is made, we shall briefly discuss the right of claimants to participate in the fund. It is a rule without exception, that the fund in court being merely a substitute for that which is sold, a valid encumbrance which is discharged by the sale must share in the proceeds so far as they will reach; but the converse of this rule is not invariably true, for, as we shall see, there are certain preferred claims which may come upon the proceeds, but which remain a lien upon the land in the hands of the purchaser if the fund is not sufficient to pay them. It is necessary, then, to ascertain what liens are, and what are not, discharged by a sheriff's sale of land.

*Effect of the sale upon encumbrances.*—It should be premised that though a *lien* may be discharged by a sheriff's sale, an *estate* will not be. Thus a widow's third charged on land will not be divested by a sale of the land during her life under a judgment against the heirs or their grantee.<sup>1</sup> If, however, the widow dies between the levy and sale, the purchaser takes the land discharged of her estate.<sup>2</sup> So a widow's dower is such an estate as will not be discharged by the sale of the land by the sheriff under a judgment against the heirs or their vendees.<sup>3</sup> And if, being administratrix, she conveys the land pursuant to a contract of her deceased husband and under a decree of the court, and executes the deed without adding a description of her office, her dower does not pass; and if the vendee, after agreeing to apply part of his purchase-money in satisfying all judgments and liens against the vendor, purchases at a sheriff's sale under one of those judgments, the dower is not divested, for he was bound to extinguish the judgment under which the land was sold.<sup>4</sup> But where a widow's share was a charge upon the land, the arrears of interest are discharged by a sheriff's sale, and are payable out of the proceeds;<sup>5</sup> and so the arrears of an annuity payable to the widow are discharged, but not so future instalments, because they cannot be computed; the purchaser takes subject to them.<sup>6</sup> And where the real amount or value of an encumbrance is not capable of computation, it is not discharged.<sup>7</sup>

And where land is devised at a price or valuation to be paid by

<sup>1</sup> Fisher v. Kean, 1 Watts 259; in Mentzer v. Menor, 8 Watts 297-299. Mentzer v. Menor, 8 Watts 296; Swar's Appeal, 1 Barr 95; Mix v. Ackla, 7 Watts 316; Lauman's Appeal, 8 Barr 473; Moor v. Shultz, 1 Harris 103; Kline v. Bowman, 7 Harris 24; Schertzer's Executors v. Herr, 7 Harris 34.

<sup>2</sup> Riddle's Appeal, 1 Wright 177.

<sup>3</sup> Schall's Appeal, 4 Wright 170, sustaining Zeigler's Appeal, 11 Casey 182, and qualifying Kurtz's Appeal, 2 Casey 465. See the question discussed

<sup>4</sup> Schurtz v. Thomas, 8 Barr 359.

<sup>5</sup> Schertzer's Executors v. Herr, 7 Harris 34; Lauman's Appeal, 8 Barr 473.

<sup>6</sup> Reed v. Reed, 1 W. & S. 239.

<sup>7</sup> Hellman v. Hellman, 4 Rawle 447; Luce v. Snively, 4 Watts 397; Knaub v. Esseck, 2 Watts 282; Custer v. Detterer, 3 W. & S. 28; Moore v. Shultz, 1 Harris 103.

delays to pay it over to the plaintiff will be given to the prothonotary if no objection exists. The practice of the court, except upon application of reasonable ground to dispute

The money must be actually in the court jurisdiction over the court are powerless for enforcing it while yet in the hands of the sheriff paying and money is in the court of the creditors not parties before final decree

But where a portion of the money is paid to the creditor, such portion cannot be recovered, can be used for his use *pro se*. In considering the matter the court will confer jurisdiction and nor would the case be a proceeding up with the Assessor are the co-

passes subject to the vendee's title is sold by the sheriff's vendee takes the shares of land charged with payment of the title, and the shares of some of the land they had elected whether or not afterwards they elected to take the legacy was not discharged by the court otherwise, and it was decided the devisee discharged legacies charged payable out of the proceeds.<sup>3</sup>

given in proceedings in partition to the shares of the valuation, is discharged for the debt of the ancestor.<sup>4</sup>

It has been said that a judicial sale will not discharge the charge stands in the title, and by the court undertaking to administer the charge in order to fulfil the purposes of the charge.<sup>5</sup>

where a father conveyed land to his son on condition that a portion of the purchase-money, the interest to be paid to the grantor and his wife, and the survivor of them, during their lives, and the premises were afterwards sold on a judgment against the purchaser took subject to the charge mentioned in the deed.<sup>6</sup> And a mortgage which partakes of the character of an estate in the land, and is of such character that prior to 1830 it could not have been discharged by a sale

under a prior judgment, and which could under no circumstances have come into competition with the judgment under which the sale is made, is not discharged by the sale, though not recorded, and the purchaser have no notice of it.<sup>7</sup> And though equitable considerations are not favored by the law of Pennsylvania, yet the parties to a deed of conveyance may, by clear and express words, create liens upon land either for purchase-money or for performance of collateral obligations which will be binding upon themselves and their privies: but such liens will be divested by subsequent sheriffs' sales, unless they are in the nature of testamentary provisions for wives and children, or are incapable of valuation, or are expressly created to run with the land: a mere recital on the face of the title that the purchase-money is unpaid and is to be paid annually, does not of itself create a lien which cannot be discharged: to have that effect the conveyance should express an intention to charge the annuity as a lien upon the land.<sup>8</sup> And where the land was conveyed "sub-

<sup>1</sup> Hart v. Homiller, 8 Harris 248; Hart v. Homiller's Executor, 11 Harris 39.

<sup>2</sup> Newman's Appeal, 11 Casey 339. And see Dewalt's Appeal, S. Ct., 20 Leg. Int. 357.

<sup>3</sup> Riley's Appeal, 10 Casey 291. See Gallagher's Appeal, 12 Wright 121.

<sup>4</sup> Commonwealth v. McIntire, 8

Barr 295.

<sup>5</sup> Dewalt's Appeal, 8 Harris 236; Hart v. Homiller, 8 Harris 248.

<sup>6</sup> Dewalt's Appeal, *ubi supra*.

<sup>7</sup> Hibberd v. Bovier, 1 Grant 266.

<sup>8</sup> Hiester v. Green, 12 Wright 96; Heist v. Baker, 13 Wright 9; Strauss's Appeal, 13 Wright 353.

a sum of money to the heirs of the grantor only after their decease, and the grantor and sale of the land under a judgment against the same as divested by the sale.<sup>1</sup>

Prior to the Act of 6th April 1830, the law was that the purchaser of land at the sheriff's sale took it clear of all encumbrances, both prior and subsequent to that under which the sale was made, and the purchase-money went to the lien-creditors according to their legal priority.<sup>2</sup> And this is still the rule in regard to judgments, for the Act of 1830, as will presently be seen, applies to mortgages. But a sale by an executor under a will never does not divest the lien of a judgment obtained in testator's lifetime: this is not a judicial sale.<sup>3</sup> And a sale under a judgment obtained after the defendant had entered into articles of agreement for the sale of his land, passes only the estate left in the defendant, and gives the sheriff's vendee the right to the unpaid purchase-money, but he takes this subject to the payment of the liens against the defendant prior to the contract of sale, such liens not being discharged by the sheriff's sale.<sup>4</sup>

A vendor who agreed to make a title free from encumbrances, cannot afterwards purchase a judgment against the land and enforce it against his vendee, or have it paid out of the proceeds of a sheriff's sale of the premises to the prejudice of judgment-creditors of the vendee: the lien of such judgment against the estate ceased as soon as it was acquired by the vendee.<sup>5</sup>

A sheriff's sale under a judgment obtained after the defendant had conveyed the land in fraud of his creditors, does not discharge the lien of judgments prior to the fraudulent conveyance. Such conveyance is not void but only voidable by the creditors whom it was intended to defraud, which does not include prior lien-creditors: the fraudulent conveyance changes the title, and subsequent judgments against the grantor do not bind the same title as the former judgments, and consequently the prior liens are not affected by a sale under the subsequent judgments.<sup>6</sup> And the rule applies to other kinds of prior encumbrances, such as arrears of ground-rent and taxes.<sup>7</sup> But judgments obtained subsequent to such fraudulent conveyance are discharged by a sale under a judgment of the same class.<sup>8</sup> Where the vendee of land has not paid the purchase-money in full, nor received a deed, the sale of the land under a judgment against him will not discharge the lien of a judgment against the vendor.<sup>9</sup>

Although all liens, such as judgments, *testatum fi. fas.*, or levies on the title sold, which existed prior to a sheriff's sale, appear to be

<sup>1</sup> Strauss's Appeal, 13 Wright 353.

<sup>2</sup> McCall v. Lenox, 9 S. & R. 306, 314; Harrison v. Waln, Ibid. 318; Auwerter v. Mathiot, Ibid. 403; Fickes v. Ersick, 2 Rawle 166; Hellman v. Hellman, 4 Rawle 447.

<sup>3</sup> Fisher v. Kurtz, 4 Casey 47.

<sup>4</sup> Patterson's Estate, 1 Casey 71.

<sup>5</sup> Dentler's Appeal, 11 Harris 505.

<sup>6</sup> Byrod's Appeal, 7 Casey 241; Fisher's Appeal, 9 Casey 294; Hoffman's Appeal, 8 Wright 95.

<sup>7</sup> Fisher's Appeal, 9 Casey 294.

<sup>8</sup> Abbott v. Remington, D. C. Phila., 4 Phila. Rep. 34.

<sup>9</sup> Creigh v. Shatto, 9 W. & S. 82.

the devisee, if the devise is accepted, the title passes subject to the charge or lien for the price, and if the devisee's title is sold by the sheriff, and in all the proceedings the title is described as taken and sold subject to the unpaid valuation, the sheriff's vendee takes the land so charged.<sup>1</sup> So where the devisees of land charged with payment of a legacy had an independent title, and the shares of some of them were sold by the sheriff before they had elected whether or not to take under the will; but afterwards they elected to take under the will; the lien of the legacy was not discharged by the sheriff's sale.<sup>2</sup> This had been ruled otherwise, and it was decided that a sale for the debts of the devisee discharged legacies charged on the land, and they became payable out of the proceeds.<sup>3</sup>

The lien of recognisances, given in proceedings in partition to secure the other heirs their shares of the valuation, is discharged by a sheriff's sale of the land for the debt of the ancestor.<sup>4</sup>

And in general it has been said that a judicial sale will not discharge an encumbrance where the charge stands in the name of the grantor, and can be discharged only by the court undertaking to advance the fund by investing it in order to fulfil the purposes of the deed. Thus where a father conveyed land to his son on condition that a bond should be given for part of the purchase-money, the bond to be paid to the grantor and his wife, and the survivor of them for life, and the premises were afterwards sold on a judgment against the grantee, it was held that the purchase-money was subject to the charge contained in the deed.<sup>5</sup> And a mortgage which parts with the nature of an estate in the land, and is of a permanent character, to the Act of 1830 it could not be discharged by a sheriff's sale under a junior judgment, and which judgment was not a lien, and have come into competition with the mortgage, under which a sale is made, is not discharged by the sheriff's sale, though the purchaser have no notice of the mortgage, though the liens are not favored by the law of Pennsylvania, and the deeds of conveyance may, by clear and express terms, create a lien upon land either for purchase-money or for a debt, and the conditions which will be binding upon the purchaser, and their purchase-money is unpaid and is to be paid to the grantor, and itself create a lien which cannot be discharged by a sheriff's sale, if the conveyance should *express* an intention to create a lien as a lien upon the land.<sup>6</sup> And where the land is sold

<sup>1</sup> Hart v. Homiller, 8 Harris 248; Barr 295.  
Hart v. Homiller's Executor, 11 Harris 39.

<sup>2</sup> Newnan's Appeal, 11 Casey 339.  
And see Dewalt's Appeal, S. Ct., 20 Leg. Int. 357.

<sup>3</sup> Riley's Appeal, 10 Casey 291. See Gallagher's Appeal, 12 Wright 121.

<sup>4</sup> Commonwealth v. McIntire, 8

<sup>5</sup> Dewalt's Appeal, 11 Casey 339.  
Hart v. Homiller's Executor, 11 Harris 39.

<sup>6</sup> Dewalt's Appeal, 11 Casey 339.

<sup>7</sup> Hibberd v. Baker, 13 Wright 121.

<sup>8</sup> Heister v. O'Neil, 13 Wright 121.

Heist v. Baker, 13 Wright 121.

Appeal, 13 Wright 121.





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*Judgments.*—Prior to the Act of 6th April 1830, the law was settled that the purchaser of land at the sheriff's sale took it clear of all encumbrances, both prior and subsequent to that under which the sale was made, and the purchase-money went to the lien-creditors according to their legal priority.<sup>2</sup> And this is still the rule in regard to judgments, for the Act of 1830, as will presently be seen, only applies to mortgages. But a sale by an executor under a power does not divest the lien of a judgment obtained in testator's lifetime: this is not a judicial sale.<sup>3</sup> And a sale under a judgment obtained after the defendant had entered into articles of agreement for the sale of his land, passes only the estate left in the defendant, and gives the sheriff's vendee the right to the unpaid purchase-money, but he takes this subject to the payment of the liens against the defendant prior to the contract of sale, such liens not being discharged by the sheriff's sale.<sup>4</sup>

A vendor who agreed to make a title free from encumbrances, cannot afterwards purchase a judgment against the land and enforce it against his vendee, or have it paid out of the proceeds of a sheriff's sale of the premises to the prejudice of judgment-creditors of the vendee: the lien of such judgment against the estate ceased as soon as it was acquired by the vendee.<sup>5</sup>

A sheriff's sale under a judgment obtained after the defendant had conveyed the land in fraud of his creditors, does not discharge the lien of judgments prior to the fraudulent conveyance. Such conveyance is not void but only voidable by the creditors whom it tended to defraud, which does not include prior lien-creditors: the fraudulent conveyance changes the title, and subsequent judgments against the grantor do not bind the same title as the former judgments, and consequently the prior liens are not affected by a sale under the subsequent judgments.<sup>6</sup> And the rule applies to other kinds of prior encumbrances, such as arrears of ground-rent and taxes.<sup>7</sup> But judgments obtained subsequent to such fraudulent conveyance are discharged by a sale under a judgment of the same class.<sup>8</sup> Where the vendee of land has not paid the purchase-money in full, nor received a deed, the sale of the land under a judgment against him will not discharge the lien of a judgment against the vendor.<sup>9</sup>

Although all liens, such as judgments, *testatum fi. fas.*, or levies on the title sold, which existed prior to a sheriff's sale, appear to be

<sup>1</sup> Strauss's Appeal, 13 Wright 353.

<sup>2</sup> McCall v. Lenox, 9 S. & R. 306, 314; Harrison v. Waln, Ibid. 318; Auwerter v. Mathiot, Ibid. 403; Fickes v. Ersick, 2 Rawle 166; Hellman v. Hellman, 4 Rawle 447.

<sup>3</sup> Fisher v. Kurtz, 4 Casey 47.

<sup>4</sup> Patterson's Estate, 1 Casey 71.

<sup>5</sup> Dentler's Appeal, 11 Harris 505.

<sup>6</sup> Byrod's Appeal, 7 Casey 241; Fisher's Appeal, 9 Casey 294; Hoffman's Appeal, 8 Wright 95.

<sup>7</sup> Fisher's Appeal, 9 Casey 294.

<sup>8</sup> Abbott v. Remington, D. C. Phila., 4 Phila. Rep. 34.

<sup>9</sup> Creigh v. Shatto, 9 W. & S. 82.

the devisee, if the devise is accepted, the title passes subject to the charge or lien for the price, and if the devisee's title is sold by the sheriff, and in all the proceedings the title is described as taken and sold subject to the unpaid valuation, the sheriff's vendee takes the land so charged.<sup>1</sup> So where the devisees of land charged with payment of a legacy had an independent title, and the shares of some of them were sold by the sheriff before they had elected whether or not to take under the will; but afterwards they elected to take under the will; the lien of the legacy was not discharged by the sheriff's sale.<sup>2</sup> This had been ruled otherwise, and it was decided that a sale for the debts of the devisee discharged legacies charged on the land, and they became payable out of the proceeds.<sup>3</sup>

The lien of recognisances, given in proceedings in partition to secure the other heirs their shares of the valuation, is discharged by a sheriff's sale of the land for the debt of the ancestor.<sup>4</sup>

And in general it has been said that a judicial sale will not discharge an encumbrance where the charge stands in the title, and can be discharged only by the court undertaking to administer the fund by investing it in order to fulfil the purposes of the charge.<sup>5</sup> Thus where a father conveyed land to his son on condition that a bond should be given for part of the purchase-money, the interest to be paid to the grantor and his wife, and the survivor of them, during life, and the premises were afterwards sold on a judgment against the grantee, it was held that the purchaser took subject to the charge contained in the deed.<sup>6</sup> And a mortgage which partakes of the nature of an estate in the land, and is of such character that prior to the Act of 1830 it could not have been discharged by a sale under a junior judgment, and which could under no circumstances have come into competition with the judgment under which the sale is made, is not discharged by the sale, though not recorded, and though the purchaser have no notice of it.<sup>7</sup> And though equitable liens are not favored by the law of Pennsylvania, yet the parties to deeds of conveyance may, by clear and express words, create liens upon land either for purchase-money or for performance of collateral conditions which will be binding upon themselves and their privies: but such liens will be divested by subsequent sheriffs' sales, unless they are in the nature of testamentary provisions for wives and children, or are incapable of valuation, or are expressly created to run with the land: a mere recital on the face of the title that the purchase-money is unpaid and is to be paid annually, does not of itself create a lien which cannot be discharged: to have that effect the conveyance should *express* an intention to charge the annuity as a lien upon the land.<sup>8</sup> And where the land was conveyed "sub-

<sup>1</sup> Hart v. Homiller, 8 Harris 248; Hart v. Homiller's Executor, 11 Harris 39.

<sup>2</sup> Newman's Appeal, 11 Casey 339. And see Dewart's Appeal, S. Ct., 20 Leg. Int. 357.

<sup>3</sup> Riley's Appeal, 10 Casey 291. See Gallagher's Appeal, 12 Wright 121.

<sup>4</sup> Commonwealth v. McIntire, 8

Barr 295.

<sup>5</sup> Dewart's Appeal, 8 Harris 236; Hart v. Homiller, 8 Harris 248.

<sup>6</sup> Dewart's Appeal, *ubi supra*.

<sup>7</sup> Hibberd v. Bovier, 1 Grant 266.

<sup>8</sup> Heister v. Green, 12 Wright 96; Heist v. Baker, 13 Wright 9; Strauss's Appeal, 13 Wright 353.

ject to the payment" of a sum of money to the heirs of the grantor and his wife immediately after their decease, and the grantor and wife died before the sale of the land under a judgment against the grantee, the lien was divested by the sale.<sup>1</sup>

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<sup>3</sup> Fisher v. Kurtz, 4 Casey 47.

<sup>4</sup> Patterson's Estate, 1 Casey 71.

<sup>5</sup> Dentler's Appeal, 11 Harris 505.

<sup>6</sup> Byrod's Appeal, 7 Casey 241; Fisher's Appeal, 9 Casey 294; Hoffman's Appeal, 8 Wright 95.

<sup>7</sup> Fisher's Appeal, 9 Casey 294.

<sup>8</sup> Abbott v. Remington, D. C. Phila., 4 Phila. Rep. 34.

<sup>9</sup> Creigh v. Shatto, 9 W. & S. 82.

discharged by it, this appearance may be changed by showing fraud in the sale.<sup>1</sup>

Where the land is sold under a junior judgment, the plaintiff in an elder judgment is not bound to come and take the money; and if the sheriff distributes the money without paying his lien, and the money goes to the ease of the defendant by paying his other debts, the elder judgment will still be good against the defendant, though its lien is discharged.<sup>2</sup>

*Purchase-money.*—A sheriff's sale of the interest of a vendee under articles, does not disturb the vendor's lien for the unpaid purchase-money, although the latter may have obtained a judgment for the amount thereof prior to the levy and sale, unless such sale is made on the vendor's judgment.<sup>3</sup> So a sale under a judgment obtained by the endorsee of a note given for a portion of the purchase-money, does not pass the estate of the vendee discharged from the lien of the remainder of the unpaid purchase-money.<sup>4</sup> But where the vendor himself caused the sheriff's sale, the law will imply an agreement by him that all the estate shall pass by that sale, and consequently the lien of the purchase-money is discharged by a sale under a judgment against the vendee for a portion of the purchase-money.<sup>5</sup>

If the lien for purchase-money is to prevail against a sheriff's sale on the judgment of a stranger, it must be distinctly expressed in the deed; it will not be implied because of non-payment.<sup>6</sup>

*Ground-rent.*—Arrears of ground-rent due at the time of the sale are discharged;<sup>7</sup> but not where the deed contained no clause of re-entry;<sup>8</sup> nor where a subsequent mortgage exists which is not discharged;<sup>9</sup> or where the sale was made subject to a mortgage and a prior ground-rent.<sup>10</sup> But if the proceeds are not sufficient to pay the arrears the tenant's personal liability is not extinguished.<sup>11</sup> A sheriff's sale under a judgment obtained after the defendant had executed a conveyance fraudulent as to creditors, does not discharge prior liens for arrears of ground-rent and taxes.<sup>12</sup>

*Sheriff's recognisance.*—The lien of a sheriff's recognisance is discharged by a sheriff's sale under a prior mortgage,<sup>13</sup> but not by a sale under a subsequent encumbrance.<sup>14</sup> This is a lien expressly created for a great public object, which cannot be defeated or impaired by any judicial sale whatever.<sup>15</sup>

<sup>1</sup> Beekman's Appeal, 2 Wright 385.

<sup>2</sup> Storble v. Cleaver, S. Ct., 1 Am. L. J. 74.

<sup>3</sup> Canon v. Campbell, 10 Casey 309; Springer v. Walters, Ibid. 328.

<sup>4</sup> Bradley v. O'Donnell, 8 Casey 279.

<sup>5</sup> Love v. Jones, 4 Watts 470; Graff v. Kelly, 7 Wright 453. And where plaintiff purchased at the sheriff's sale, his right to recover the residue is extinguished: Ibid.

<sup>6</sup> Strauss's Appeal, 13 Wright 355.

<sup>7</sup> Ter Hoven v. Kerns, 2 Barr 96. See Bontelean v. Smith, 2 Binn. 146; Sands v. Smith, 3 W. & S. 12; Pancoast's

Appeal, 8 W. & S. 381; Creigh v. Shatto, 9 W. & S. 84; Dougherty's Estate, 9 W. & S. 189; Western Bank v. Willetts, 2 Pittsburgh L. J. 45.

<sup>8</sup> Sands v. Smith, 3 W. & S. 9.

<sup>9</sup> Field v. Oberteuffer, D. C. Phila., 2 Phila. Rep. 271.

<sup>10</sup> Devine's Appeal, 6 Casey 349.

<sup>11</sup> Hiester v. Shaeffer, 9 Wright 537.

<sup>12</sup> Fisher's Appeal, 9 Casey 294.

<sup>13</sup> Spang v. Commonwealth, 2 Jones 358.

<sup>14</sup> McKenzy's Appropriation, 3 Barr 159.

<sup>15</sup> Ibid. 160.

*Debts of decedent.*—A special sale of real estate cast on an heir by descent, under a judgment against the heir, does not divest the statutory lien of the ancestor's debts.<sup>1</sup> It seems to be otherwise where the land is sold under a judgment originally obtained against the ancestor during his lifetime.<sup>2</sup> And it has since been held, that the sale of land under a judgment against the heir does divest the lien of the ancestor's debts, even though the sale was made within the period allowed by law for the continuance of the lien.<sup>3</sup>

A legacy charged upon lands is divested by a sheriff's sale of the land for the debt of the testator; and a sale by order of the Orphans' Court has the same effect,<sup>4</sup> even though the legacy was payable by instalments, some of which are not yet due.<sup>5</sup> But not when the land was sold for the debts of the son of the testator, who was trustee for the legatee, and residuary legatee in case of the death of the legatee before the time appointed for the payment of the legacy; this lien was of such indeterminate value that it could not be divested by the sale.<sup>6</sup> But in order to make a legacy a charge upon lands, it must appear by direct expression or plain implication that such was the will of the testator.<sup>7</sup> Where a legacy is charged upon lands devised to several, and the share of one was sold under execution before proceedings commenced to recover the legacy, the land is discharged by the sale of its proportion of the burthen of the legacy.<sup>8</sup>

The lien of recognisances given by one of the heirs to others is discharged by a sheriff's sale of the land for the debts of the ancestor.<sup>9</sup>

So the widow's lien for her statutory thirds, is divested by a sheriff's sale of the land for a debt of her deceased husband.<sup>10</sup>

*Municipal claims* for paving, grading, laying water-pipe, &c., in Philadelphia, are by the Act of 3d February 1824, and subsequent acts,<sup>11</sup> made a lien upon the real estate assessed. This lien is specially favored by the law, and the Act of 11th March 1846, provides that it shall not be divested by any judicial sale as respects so much thereof as the proceeds of such sale may be insufficient to discharge and pay.<sup>12</sup> But such lien is divested by a sale under a judgment founded on the claim itself, even though the purchase-

<sup>1</sup> 9 Pittsburgh Leg. Jour. 345.

<sup>2</sup> See Act 24th February 1834, § 33, Purd. Dig. 288, pl. 79; Morrison's Case, 9 W. & S. 116; Willing v. Yohe, D. C. Phila., 1 Phila. Rep. 223.

<sup>3</sup> Luce v. Soirely, 4 Watts 396.

<sup>4</sup> McLanahan v. Wyant, 1 Pa. R. 112; Barnet v. Washebaugh, 16 S. & R. 410; Randolph's Appeal, 5 Barr 245.

<sup>5</sup> Hellman v. Hellman, 4 Rawle 440; Lobach's Case, 6 Watts 167. Instalments not due are to be reduced to their present worth, interest being taken at six per cent.: Ibid.

<sup>6</sup> Dewart's Appeal, 7 Wright 325.

<sup>7</sup> Barnet v. Washebaugh, 16 S. & R. 410; Randolph's Appeal, 5 Barr 245;

Mellon's Appeal, 10 Wright 165.

<sup>8</sup> Lapsley v. Lapsley, 9 Barr 130.

<sup>9</sup> Commonwealth v. McIntire, 8 Barr 295. But the debts secured by the recognisances are not wholly discharged if the sum due on the recognisances was enough to pay the ancestor's debts for which the land was liable: Ibid.

<sup>10</sup> Swar's Appeal, 1 Barr 92. In such case, after paying the prior incumbrances, one-third of the surplus is to be put out at interest for the widow for life.

<sup>11</sup> See Purd. Dig., "Municipal Claims and Taxes," pp. 747 *et seq.*

<sup>12</sup> Sect. 6, Purd. Dig. 752, pl. 32, Pamph., L. 115.

money is insufficient to pay it.<sup>1</sup> The Act of 1824 has been extended to Alleghany county,<sup>2</sup> and is the general law governing liens of this kind in that county: under this general law such liens are divested by a judicial sale of the land; the special Acts of 5th April 1849,<sup>3</sup> 8th April 1851,<sup>4</sup> and 30th May 1852,<sup>5</sup> do not change the law in this respect; the assessments authorized by those acts are discharged by a judicial sale of the premises, so far as the money realized from the sale will pay the same.<sup>6</sup>

A judicial sale for an amount more than sufficient to discharge a municipal claim is a discharge of the lien, though not of the debt, unless actually paid over by the sheriff to the parties entitled.<sup>7</sup> And a sale of a portion of the premises for a sum more than sufficient to pay the claim, operates to discharge the entire property from the lien.<sup>8</sup>

As will be presently shown, the lien of a mortgage, which is prior to all other liens on the mortgaged premises, is not divested by a judicial sale of the land under a subsequent lien; but by the Act of 1824, the lien of municipal claims and taxes in Philadelphia is made prior in order of payment to an antecedent mortgage; hence, it was held that the existence of a subsequent municipal claim operated to cause a mortgage, which was the first lien on the land as to date, to be discharged by a judicial sale: this was remedied by the Act of 11th April 1835, which provided that the existence of a municipal claim should not work such a consequence:<sup>9</sup> but it is an established doctrine, that a sale subject to a fixed lien is necessarily subject to all encumbrances prior to such lien,<sup>10</sup> and therefore it was inferred that the lien of the mortgage being preserved under the Act of 1835, the prior lien of the municipal claim was also preserved, and was not discharged by the sheriff's sale:<sup>11</sup> this again was remedied by the Act of 16th April 1845,<sup>12</sup> which re-enacts in substance the Act of 1835; but provides that the continuance of the lien of the mortgage shall not prevent the discharge of the prior lien of the municipal claim.<sup>13</sup>

*Taxes.*—The lien of taxes in Philadelphia is subject to the same regulations as that of municipal claims, as regards the effect of a judicial sale upon it: in most of the acts taxes and municipal claims are mentioned together. And in the Act of 11th March 1846,<sup>14</sup>

<sup>1</sup> *Moyamensing v. Shubert*, C. P. Phila., 1 Phila. Rep. 256; s. c., 4 Am. L. J. 255.

<sup>2</sup> By Act of 5th April 1844, Pamph. L. 199.

<sup>3</sup> Pamph. L. 341.

<sup>4</sup> Pamph. L. 371.

<sup>5</sup> Pamph. L. 204.

<sup>6</sup> *Allegheny City's Appeal*, 5 Wright 60.

<sup>7</sup> *City of Philadelphia v. Cooke*, 6 Casey 56; *Myer v. Burus*, D. C. Phila., 4 Phila. Rep. 314.

<sup>8</sup> *Myer v. Brown*, 18 Leg. Int. 220.

<sup>9</sup> The effect of a sheriff's sale on a mortgage will be more fully discussed

hereafter.

<sup>10</sup> *Mix v. Ackla*, 7 Watts 316; *Tower's Appropriation*, 9 W. & S. 103; *Swar's Appeal*, 1 Barr 92; *Lauman's Appeal*, 8 Barr 473; *Northern Liberties v. Swain*, 1 Harris 113; *Devine's Appeal*, 6 Casey 350.

<sup>11</sup> *Northern Liberties v. Swain*, 1 Harris 113.

<sup>12</sup> Sect. 4, *Purd. Dig.* 325, pl. 101, Pamph. L. 489.

<sup>13</sup> *Northern Liberties v. Swain*, 1 Harris 113. See *Perry v. Brinton*, *ibid.* 202.

<sup>14</sup> Sect. 6, *Purd. Dig.* 752, pl. 32, Pamph. L. 115.



which enacts that the lien of municipal claims shall not be discharged by a sheriff's sale unless the proceeds are sufficient to pay them, it has been held that the lien of registered taxes is embraced, though not specified.<sup>1</sup>

Where a sheriff's sale of real estate in Philadelphia was made in August 1860, the taxes for 1859 and 1860 were not discharged by the sale; the lien of registered taxes for 1859 was not discharged because the fund was not sufficient to pay them, and the taxes for 1860 fall upon the property, and are payable by the purchaser.<sup>2</sup>

It is said to be the practice in Philadelphia to pay the taxes in all cases out of the proceeds of the sheriff's sale.<sup>3</sup>

A sheriff's sale, under a judgment obtained after the execution by the defendant of a conveyance fraudulent as to creditors, does not discharge prior liens for arrears of ground-rent and taxes.<sup>4</sup>

A sale of a portion of the premises for a sum more than sufficient to pay the taxes, operates to discharge the entire property from the lien, for the lien is an entirety, and cannot be apportioned.<sup>5</sup>

*Mortgages.*—Formerly mortgages were on the same footing as other encumbrances, and were discharged by a judicial sale of the land, whether the judgment upon which the sale was made was prior or subsequent in date to the mortgage.<sup>6</sup> A mortgage to the commonwealth was however an exception.<sup>7</sup>

But now, when the lien of a mortgage is prior to all other liens upon the same property, except other mortgages, ground-rents, and the purchase-money due to the commonwealth, the lien of such mortgage is not destroyed, or in any way affected by any sale made under any writ of *venditioni exponas*,<sup>8</sup> nor by a sale under a *levari facias*, issued under a subsequent mortgage,<sup>9</sup> nor by any sale made under any writ of execution.<sup>10</sup>

And where the mortgagee, having received the money due on the bonds out of the proceeds of a sale under a junior judgment, has written on the record that all the bonds secured by this mortgage were paid, he can recover on the mortgage upon showing that the funds were misappropriated to his lien by the sheriff, and that he had been compelled to refund to the sheriff.<sup>11</sup>

And a judgment on the bond accompanying a mortgage stands on the same footing with the mortgage itself in this respect: the act preserves the lien of the mortgage-debt from being discharged under such circumstances.<sup>12</sup> The 5th section of the Act of 16th

<sup>1</sup> *City v. Duffy*, D. C. Phila., 4 Phila. Rep. 289. Affirmed, 6 Wright 192.

<sup>2</sup> *Duffy v. City of Philadelphia*, 6 Wright 192.

<sup>3</sup> See note by Ed. Leg. Int., vol. 15, p. 150.

<sup>4</sup> *Fisher's Appeal*, 9 Casey 294.

<sup>5</sup> *City v. McGonigle*, C. P. Phila., 4 Phila. Rep. 351.

<sup>6</sup> *Willard v. Norris*, 2 Rawle 56; *McGrew v. Lanahan*, 1 Pa. R. 44; *Hoover v. Shields*, 2 Pa. R. 135; *Corporation v. Wallace*, 3 Rawle 109.

<sup>7</sup> *Duncan v. Reiff*, 3 Pa. R. 368.

<sup>8</sup> Act 6th April 1830, § 1, *Purd. Dig.* 325, pl. 97, *Pamph. L.* 293. And see *Bratton's Appeal*, 8 Barr 164; *Cross v. Stahlman*, 7 Wright 129.

<sup>9</sup> *Ibid.*, § 2.

<sup>10</sup> Act 16th April 1845, § 1, *Purd. Dig.* 325, pl. 99, *Pamph. L.* 488.

<sup>11</sup> *Cross v. Stahlman*, 7 Wright 129.

<sup>12</sup> *Commonwealth v. Wilson*, 10 Casey 63, overruling *Whitehead v. Purnell*, 2 Miles 434. See *Kuhn's Appeal*, 2 Barr 264.

April 1845,<sup>1</sup> as to this point, was merely declaratory of the existing law.<sup>2</sup>

A sale under an order of the Orphans' Court for payment of the debts of a decedent, will discharge the lien of a mortgage which is prior to all other liens.<sup>3</sup>

So the lien of a mortgage which is prior to all other liens, is not affected by an *extent* under a subsequent judgment.<sup>4</sup>

If the sale is made under a judgment on the bond, or on one of several bonds accompanying the mortgage, the lien of the mortgage is discharged though the judgment was subsequent in date to the mortgage, and the mortgage was prior to all other liens;<sup>5</sup> and so of a sale under a judgment for arrears of interest due on the mortgage;<sup>6</sup> or on the accompanying bond,<sup>7</sup> and in the latter case it makes no difference that the mortgagor aliened before the entry of judgment, nor that the mortgage was conditioned for the payment of the amount mentioned in the bond, without any express stipulation as to interest.<sup>8</sup> It must, however, appear so on the face of the record.<sup>9</sup>

Where the mortgagee, whose mortgage was prior to all other liens, became the purchaser at a sale under a junior judgment, the lien of the mortgage will not, in the absence of a previous stipulation inserted in the conditions of sale, be thereby discharged.<sup>10</sup>

As has already been seen, the sheriff may sell expressly subject to a lien which would otherwise be discharged,<sup>11</sup> and in such case the courts will enforce the contract.<sup>12</sup> Thus, where two writs, issued for the sale of mortgaged premises, one of them on a judgment for part of the mortgage-debt, and the other on a judgment obtained subsequent to the mortgage for a debt unconnected with it, and at the sale the counsel having charge of the first writ, gave public notice to the effect that the property was selling subject to the mortgage, and the sheriff returned the property sold on the latter writ, it was held that the purchaser, who was present when the notice was given, took the property subject to the mortgage.<sup>13</sup>

Where a mortgage would have been discharged by the sale, a parol agreement that its lien should continue, made before the sale between the mortgagee and one who afterwards purchased at the sale, though valid as between the parties, is not binding upon one who subsequently purchased from the sheriff's vendee *bonâ fide* for a valuable consideration, and without notice of such agreement;

<sup>1</sup> Purd. Dig. 326, pl. 102, Pamph. L. 489.

<sup>2</sup> Commonwealth v. Wilson, 10 Casey 63.

<sup>3</sup> Moore v. Shultz, 1 Harris 103.

<sup>4</sup> Bank v. Patterson, 9 Barr 311.

<sup>5</sup> Pierce v. Potter, 7 Watts 475, Cronister v. Weise, 8 Watts 215; Berger v. Hiestor, 6 Whart. 214; Clarke v. Stanley, 10 Barr 478; Bank v. Chester, 1 Jones 287; Bratton's Appeal, 8 Barr 164; Hartz v. Woods, 8 Barr 471; Ridgway v. Longaker, 6 Harris 215. And see the proviso to Act 16th April

1845, § 5, Purd. Dig. 326, pl. 102, Pamph. L. 489.

<sup>6</sup> Bank v. Chester, 1 Jones 283; Clarke v. Stanley, 10 Barr 472.

<sup>7</sup> Hartz v. Woods, 8 Barr 471.

<sup>8</sup> Ibid.; Bank v. Chester, 1 Jones 283. See Clarke v. Stanley, 10 Barr 472; Moore v. Shultz, 1 Harris 103.

<sup>9</sup> Norris v. Brady, D. C. Phila., 4 Phila. 287.

<sup>10</sup> Crawford v. Boyer, 2 Harris 380.

<sup>11</sup> Vide ante, p. 1002.

<sup>12</sup> Zeigler's Appeal, 11 Casey 173.

<sup>13</sup> Shryock v. Jones, 10 Harris 303.

and it made no difference that the sheriff was privy, or assented to the agreement.<sup>1</sup>

Where there are several distinct parcels of land bound by the same encumbrance, even a judicial sale of one of them will not necessarily discharge the encumbrance as to the others, unless there exist an equity calling imperatively on the creditor to look to the fund raised by the sale, and he refused to do so after notice.<sup>2</sup>

In Philadelphia, when a mortgage is the first encumbrance, its lien will not be discharged by a sale under a judgment for taxes *assessed* subsequently to the date of recording the mortgage,<sup>3</sup> nor by a sale under a judgment for taxes or municipal claims *registered* subsequently to the date of recording the mortgage.<sup>4</sup>

*The liens* which, if prior to a mortgage, will operate to cause its discharge by a sheriff's sale, require some explanation.

A widow's dower, as ascertained by proceedings in partition under the Act of 1794, is an estate in law, and not a lien within the meaning of the Act of 1830.<sup>5</sup> But a pecuniary legacy charged on the land is such a lien.<sup>6</sup> And a prior mechanics' lien;<sup>7</sup> but not, it seems, if the mechanics' lien is invalid on its face.<sup>8</sup> So the liens created by deed, which have already been mentioned as discharged by a sheriff's sale, will operate to cause a subsequent mortgage to be discharged.<sup>9</sup> A judgment existing against a former owner of the land is an encumbrance which will cause the lien of a mortgage given by the present owner, to be discharged.<sup>10</sup> A judgment for purchase-money entered on the same day that the deed was delivered and recorded, has priority over a mortgage by the vendee to a stranger, executed and recorded before the delivery of the deed, and will cause the discharge of such mortgage.<sup>11</sup> And so a mortgage for purchase-money, executed at the time of the delivery of the conveyance of the legal title and duly recorded, has priority over judgments entered against the vendee after the purchase and before the conveyance, and is consequently not discharged on account of the existence of such judgments.<sup>12</sup> So the lien of a mortgage for purchase-money is not discharged by a sale under a judgment entered on the same day the mortgage was recorded, the mortgage having been entered for recording within the sixty days.<sup>13</sup> So if two mortgages were given on the same day, but one was recorded a day after the other, a sale on the second will not discharge the first: there being nothing on their face to indicate that both were given for

<sup>1</sup> Roberts v. Williams, 5 Whart. 176.

<sup>2</sup> Konigsmaker v. Brown, 2 Harris 274, per BELL, J.

<sup>3</sup> Perry v. Brinton, 1 Harris 205.

<sup>4</sup> Act 23d January 1849, § 4, Purd. Dig. 326, pl. 103, Pamph. L. 686.

<sup>5</sup> Zeigler's Appeal, 11 Casey 173, per WOODWARD, J. But see *contra*, Kurtz's Appeal, 2 Casey 465.

<sup>6</sup> Tower's Appropriation, 9 W. & S. 103.

<sup>7</sup> Goepp v. Gartiser, D. C. Phila., 3 Phila. Rep. 335.

<sup>8</sup> Ibid. A *firmed*, 11 Casey 133.

<sup>9</sup> Strauss's Appeal, 13 Wright 353. See *ante*, p. 1038.

<sup>10</sup> Byers v. Hoch, 1 Jones 258.

<sup>11</sup> Eckert v. Lewis, C. P. Bucks, 18 Leg. Int. 4; s. c., 4 Phila. Rep. 422.

<sup>12</sup> Cake's Appeal, 11 Harris 186. See Bratler's Appeal, S. Ct., 1 Am. L. J. 80. The lien of such mortgage is not lost by want of notice of it in the deed conveying the property: Eldridge v. Christy, D. C. Phila., 4 Phila. Rep. 102.

<sup>13</sup> Bratler's Appeal, S. Ct., 1 Am. L. J. 80.

purchase-money.<sup>1</sup> But where a mortgage, not for purchase-money, was recorded on the same day a judgment was entered against the mortgagor, it is not "prior to all other liens," and a sheriff's sale under a subsequent judgment will discharge the mortgage.<sup>2</sup> And where after the execution of a deed, a mortgage not for purchase-money was given and recorded, and some days after the deed was delivered and recorded, and the same day a judgment for purchase-money was entered, the judgment for purchase-money was prior to the mortgage, and the lien of the latter was therefore discharged by a sheriff's sale.<sup>3</sup>

The entry of a judgment for the same debt secured by a mortgage will not cause a sheriff's sale on a judgment for a different debt to destroy or in any way affect the lien of such mortgage.<sup>4</sup> This applies to all cases where a mortgage and judgment are taken for the same debt, whether the judgment be entered before or after the mortgage: the act is retrospective, and applies to mortgages given before its passage.<sup>5</sup>

By the Act of 3d February 1824,<sup>6</sup> the lien of taxes and municipal claims in Philadelphia has priority over mortgages and other encumbrances. Therefore under the Act of 1830 the existence of such a lien, though posterior in date to a mortgage, would have the effect of causing the discharge of the mortgage by a sheriff's sale under a subsequent encumbrance. This was remedied by the Act of 11th April 1835, which merely enacts that no lien created by the Act of 1824 shall be construed to be within the meaning of the Act of 1830;<sup>7</sup> and the Act of 16th April 1845, though more explicit, is to the same effect.<sup>8</sup> The mortgage is discharged by a sale under the claim itself, if actually prior in time to the date of recording the mortgage,<sup>9</sup> but not if the claim was registered after the mortgage.<sup>10</sup>

The neglect to register a mortgage in time will of course postpone it to a judgment subsequent in date, and will therefore render it liable to be discharged by a sheriff's sale; and the fact that the judgment-creditor had notice of the mortgage will make no difference: the date of the respective entries on the record determines the priority; with the single exception in the act,<sup>11</sup> allowing sixty days for recording a mortgage for the purchase-money, creditors as regards liens are placed on the same footing.<sup>12</sup> It is said that in the case of a mortgage for purchase-money it is the time of the commencement of the lien, and not the registration of the mortgage, which regulates and controls the operation of the subsequent sale by

<sup>1</sup> *Norris v. Brady*, D. C. Phila., 4 Phila. Rep. 287.

<sup>2</sup> *Magaw v. Garrett*, 1 Casey 319.

<sup>3</sup> *Eckert v. Lewis*, C. P. Bucks, 4 Phila. Rep. 422.

<sup>4</sup> Act 16th April 1845, § 5, *Purd. Dig.* 326, pl. 102, *Pamph. L.* 489.

<sup>5</sup> *Callender's Appeal*, S. Ct., May 1852, 1 *Whart. Dig.* 1021, pl. 830.

<sup>6</sup> *Purd. Dig.* 747, pl. 1, 8 *Sm. Laws* 189.

<sup>7</sup> Sect. 2, *Purd. Dig.* 325, pl. 100, *Pamph. L.* 190.

<sup>8</sup> Sect. 4, *Purd. Dig.* 325, pl. 101, *Pamph. L.* 489. This act may possibly apply to municipal claims and taxes prior in date, as well as in law, to a mortgage.

<sup>9</sup> *Northern Liberties v. Swain*, 1 Harris 113.

<sup>10</sup> Act 23d January 1849, § 4, *Purd. Dig.* 326, pl. 103, *Pamph. L.* 686; *Cadmus v. Jackson*, S. Ct., 23 *Leg. Int.* 196.

<sup>11</sup> Act 28th March 1820, § 1, *Purd. Dig.* 324, pl. 94, 2 *Sm. Laws* 303.

<sup>12</sup> *Hulings v. Guthrie*, 4 Barr 124.

writ.<sup>1</sup> Rent due under a mining lease is not such a prior lien as will cause the discharge of a mortgage of the leasehold.<sup>2</sup>

The time at which it is to be ascertained whether a mortgage is the first lien, is the date of the sheriff's sale.<sup>3</sup> Hence a judgment prior in date to the mortgage, but which was satisfied before the sale, is not a prior lien which will operate to discharge the lien of the mortgage.<sup>4</sup> But mere payment of the prior lien is not sufficient, it must be satisfied of record or the mortgage will be discharged.<sup>5</sup> The reason of this rule is that a purchaser at sheriff's sale is not bound to look beyond the record, and if a lien appears there unsatisfied he has a right to treat it as valid: but if a deed, &c., is defectively registered or a lien appears on its face to be null and void, then he is not bound to notice them at all.<sup>6</sup> Therefore such prior defective lien will not operate to discharge a subsequent mortgage.<sup>7</sup>

2. *Of the right to the proceeds. Claimant must have a lien, and such lien must have been discharged by the sale.*—No one is entitled to be paid out of the proceeds of a sheriff's sale unless his claim was previously a lien on the interest which passed by the sale. Hence one who claims as the grantee of the defendant by a conveyance anterior to the judgment on which the land was sold is not entitled to the proceeds as against the judgment-creditors: if his title is valid he may set it up against the sheriff's vendee.<sup>8</sup> And a judgment-creditor is not entitled to protection, as a purchaser of the legal title would be, against an equitable owner; therefore a judgment-creditor of one who holds the legal title as trustee for the vendee of land, cannot claim out of the proceeds of a sale of the land, under a judgment for a portion of the purchase-money, as against judgment-creditors of the vendee himself.<sup>9</sup>

And one who purchased land subject to a judgment, under which the land was afterwards sold by the sheriff, is entitled to the surplus as against the plaintiff in a judgment obtained against the grantor after the conveyance.<sup>10</sup> And where the defendant purchased subject to a lien for the balance of the purchase-money, and the land is afterwards sold under judgments against him, the lien for purchase-money is entitled to the proceeds as against judgments against defendant.<sup>11</sup> And since in equity a purchaser under articles of agreement is considered the owner of the land, subject to the payment of the stipulated price, it follows that when the land is sold under a judgment obtained against the vendor, prior to the date of the articles, for a sum exceeding the contract price, the vendee is entitled to the surplus as against a judgment-creditor of the vendor whose judgment was entered after the date of the articles.<sup>12</sup>

Two classes of creditors claimed the proceeds of the sale by the sheriff of a debtor's real estate: the first class obtained judgments

<sup>1</sup> Bratton's Appeal, 8 Barr 167.

<sup>2</sup> *Miners' Bank v. Heilner*, 11 Wright 452.

<sup>3</sup> *Clarke v. Stanley*, 10 Barr 472.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Magaw v. Garrett*, 1 Casey 319.

<sup>6</sup> *Goepp v. Gartiser*, 11 Casey 133.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Helfrich's Appeal*, 3 Harris 382.

<sup>9</sup> *Reed's Appeal*, 1 Harris 476.

<sup>10</sup> *Bitting & Waterman's Appeal*, 5 Harris 211.

<sup>11</sup> *Barnitz v. Smith*, 1 W. & S. 142

<sup>12</sup> *Siter's Appeal*, 2 Casey 178.

subsequently to a conveyance by the debtor of his real estate, which judgments were in full force at the date of a sale by the sheriff under a judgment of the same class: the claims of the second class were founded on liens derived from seizures of the premises, made subsequently to the sheriff's sale, under *testatum fi. fas.* issued from this county to the county where the land lay, under one of which writs the property was sold a second time by the sheriff, and the proceeds of this sale constituted the fund in court: under these circumstances it was held that the liens of the first class were discharged by the first sheriff's sale, and therefore did not bind the interest which passed by the second sale, but the liens of the second class attached in the order of the respective levies which were made thereunder, and the second class were entitled to the fund.<sup>1</sup>

A judgment is a lien according to the title which the defendant has or appears to have: if he have no title at the time it is entered it is no lien.<sup>2</sup> And judgments entered several days after the sheriff's sale are not liens on the surplus as against creditors of defendant to whom it was assigned by him after such judgments had been entered.<sup>3</sup>

It is settled that all the liens on the land which are due at the time of the sale, and have been discharged by that sale, when they can be reduced to a certainty, are entitled to payment out of the proceeds.<sup>4</sup> The date of the sheriff's sale is the point of time to which all liens entitled to payment out of the proceeds are to be computed.<sup>5</sup> And interest is allowed on liens till the day of the sheriff's sale.<sup>6</sup> So the rights of the lien-creditors are fixed by the sale, and must be determined as they existed at that time.<sup>7</sup> So a judgment entered on the very day of the sale, though some hours after the sale, is a lien on the fund and entitled to be paid in the order of priority: but judgments entered some days after the sale, are not liens on the surplus as against creditors to whom it had been assigned by defendant after the entry of such judgments.<sup>8</sup>

But though there may be no doubt that a lien has been discharged by the sale, there may be a question as to its right to participate in the proceeds.

The provisions of the Act of 1836 embrace only judgment or lien creditors of the defendant: his contract-creditors who have acquired no judgment or lien have no right to be heard as to the distribution of the proceeds, and are not entitled to a writ of error.<sup>9</sup> And an attorney has no lien for his services on money brought into court for distribution, and therefore cannot claim as distributee.<sup>10</sup> And where a mortgage was given to trustees to secure such creditors as should accept for their debts certificates payable *in futuro*, the trustees only are entitled to claim the amount of the mortgage; and

<sup>1</sup> Abbott v. Remington, D. C. Phila., 4 Phila. Rep. 34.

<sup>2</sup> Beckman's Appeal, S. Ct., 18 Leg. Int. 118.

<sup>3</sup> Small's Appeal, 12 Harris 398, citing Hahn v. Smith, 1 Pa. R. 484.

<sup>4</sup> Mohler's Appeal, 5 Barr 420. See

Custer v. Detterer, 3 W. & S. 28.

<sup>5</sup> Walton v. West, 4 Whart. 221.

<sup>6</sup> Siter's Appeal, 2 Casey 178.

<sup>7</sup> Douglass's Appeal, 12 Wright 223.

<sup>8</sup> Small's Appeal, 12 Harris 398.

<sup>9</sup> Smith v. Reiff, 8 Harris 364.

<sup>10</sup> Dubois's Appeal, 2 Wright 231.

the court at this stage cannot notice the holders of the certificates.<sup>1</sup> So debts due by a decedent, though liens upon his land, are not liens of record under the 33d section of the Act of 24th February 1833,<sup>2</sup> and even if judgments are obtained on them after his death, the plaintiffs cannot claim out of the proceeds of a sale of such land under a judgment attaching prior to his death, but must apply to the personal representatives, who, upon giving security satisfactory to the court, are entitled to the surplus remaining after the payment of judgments entered before the death of the defendant.<sup>3</sup>

So the statutory lien of decedent's debts is discharged by a sale under a testamentary power for the payment of unscheduled debts: and the purchaser is not bound to see to the application of the proceeds; though he would be so bound if the power to sell were for the payment of specific debts: a sale to an executrix unconnected with the trust is valid: it is not necessary, so far as the purchaser is concerned, that the personal assets should have been first exhausted before selling the land:<sup>4</sup> and a private sale is valid unless it is expressly directed by the will to be public.<sup>5</sup> Therefore, where the purchaser under such circumstances mortgaged the land, which was afterwards sold under the mortgage, the mortgagee was entitled to the proceeds as against creditors of the testator who obtained judgment within five years after testator's death.<sup>6</sup>

But the lien of decedent's debts is not discharged by a sale by order of the Orphans' Court, upon proceedings in partition, where the sale was under the Act 24th February 1834, and was made within two years after the grant of letters of administration.<sup>7</sup>

*Mortgages and judgments.*—A mortgage or defeasible deed in the nature of a mortgage is not a lien till recorded, except a mortgage for purchase-money, which is a lien from the date of its execution, provided it is recorded within sixty days thereafter.<sup>8</sup> So where the vendee under articles of agreement, after paying a part of the purchase-money and taking possession, assigned to a creditor as collateral security for a debt all his right and interest in the contract, such an assignment is but a mortgage of the interest of the vendee, and if not duly recorded will be postponed to subsequent judgments obtained against the vendee.<sup>9</sup> Mortgages must be recorded in the "mortgage-book," and are not properly recorded in any other species of book where they cannot be found by means of the mortgage index.<sup>10</sup> Where the grantee of land was named McHugh in the deed, and afterwards mortgaged the land by the same name, and before the mortgage was recorded a judgment was obtained against him by

<sup>1</sup> Yarnal's Appeal, 3 Barr 363.

<sup>2</sup> Purd. Dig. 288, pl. 99, Pamph. L. 79.

<sup>3</sup> Willing v. Yohe, D. C. Phila., 1 Phila. Rep. 223. See Guier v. Kelly, 2 Binn. 228; Commonwealth v. Rahm, 2 S. & R. 375; Carter v. Trueman, 7 Barr 325; Morrison's Case, 9 W. & S. 116; Blackner v. Owens, 2 Miles 365.

<sup>4</sup> Cadbury v. Duval, 10 Barr 265.

<sup>5</sup> Ibid. Act 14th March 1849, Purd. Dig. 975, pl. 62, Pamph. L. 164.

<sup>6</sup> Cadbury v. Duval, 10 Barr 265.

<sup>7</sup> Wilson's Appeal, 9 Wright 435.

<sup>8</sup> Act 28th March 1820, § 1, Purd. Dig. 324, pl. 94; 7 Sm. Laws 303.

<sup>9</sup> Russell's Appeal, 3 Harris 319.

<sup>10</sup> Luch's Appeal, 8 Wright 519.

the name of McCue, under which the mortgaged premises were sold, the judgment-creditor was entitled to the proceeds.<sup>1</sup>

But an unrecorded mortgage is good against the mortgagor, and against his grantee and subsequent lien-creditors with actual notice.<sup>2</sup> Of course, where the mortgage is not discharged by the sale, the mortgagee cannot claim to be paid out of the proceeds:<sup>3</sup> and where a mortgage payable by instalments, being within the protection of the Act of 1830, was not discharged by the sale, instalments, or arrears of interest, due at the date of the sale, are not payable out of the proceeds.<sup>4</sup> But notice given by the mortgagee at the sale, claiming that his mortgage was a lien on the land, does not estop him from coming upon the fund, if the mortgage was actually discharged by the sale.<sup>5</sup> Where land is sold under a judgment on one of several notes secured by a mortgage on the land, the mortgagee is entitled to the proceeds though some of the notes are not due.<sup>6</sup> So where the sale is under a judgment for arrears of interest, the mortgage being discharged, the mortgagee is to be paid out of the proceeds in preference to judgments posterior to the mortgage, though prior to the judgment under which the land was sold.<sup>7</sup>

A mortgage given by two tenants in common as collateral security for a joint debt, not expressed in the bond or mortgage, may be subsequently appropriated by one as security for his several debt, and survive as a lien on his share of the land after the extinguishment of the original demand.<sup>8</sup> A mortgage of an equitable estate expands, like a judgment, so as to include the subsequently acquired legal estate, and, subject to the payment of the purchase-money, has priority in distribution over a mortgage given after the legal estate had vested in the mortgagor.<sup>9</sup>

As a mortgage, which is prior to all other liens, is not affected by an *extent* under a subsequent judgment, the fund arising therefrom must go to the latter.<sup>10</sup> The lien of a mortgage given for purchase-money is not affected by want of notice, in the deed conveying the property, that such mortgage had been given.<sup>11</sup>

As mortgages must be recorded, so judgments must be docketed and indexed in order to create a lien as against subsequent purchasers and encumbrancers.<sup>12</sup> But as between the parties it is not

<sup>1</sup> McCue v. McCue, D. C. Phila., 4 Phila. Rep. 295.

<sup>2</sup> Levinz v. Will, 1 Dallas 430; Stroud v. Lockart, 4 Ibid. 153; Burke v. Allen, 3 Yeates 351; Jaques v. Weeks, 7 Watts 261; M. & M. Bank v. Bank of Pa., 7 W. & S. 335; Speer v. Evans, 11 Wright 141. Under the 8th section of the Act of 27th April 1855, *Purd. Dig.* 330, pl. 128, *Pamph. L.* 369, authorizing lessees to mortgage their terms, the lease must be recorded with the mortgage in order to give the mortgage priority over an execution-creditor of the mortgagor: *Sturtevant's Appeal*, 10 Casey 149.

<sup>3</sup> Bratton's Appeal, 8 Barr 164.

<sup>4</sup> Field v. Oberteuffer, D. C. Phila., 2 Phila. Rep. 271.

<sup>5</sup> Lindle v. Neville, 13 S. & R. 227.

<sup>6</sup> Larimer's Appeal, 10 Harris 41.

<sup>7</sup> Bank v. Chester, 1 Jones 282.

<sup>8</sup> Pechin v. Brown, D. C. Phila., 3 Phila. Rep. 62.

<sup>9</sup> Appeal of the Borough of Easton, 11 Wright 256.

<sup>10</sup> Bank v. Patterson, 9 Barr 311.

<sup>11</sup> Eldridge v. Christy, D. C. Phila., 4 Phila. Rep. 102.

<sup>12</sup> Act 21st March 1772, § 2, 1 Sm. Laws 390; Act 29th March 1827, § 3, 9 Sm. Laws 319; Act 22d April 1856, § 3, *Pamph. L.* 532. See *Purd. Dig.* 571, tit. "Judgments."



necessary that the judgment should be docketed in order to create a lien.<sup>1</sup> And as to a subsequent encumbrancer, actual notice, before his rights attach, of a judgment defectively entered is constructive notice of an entry on the judgment-docket.<sup>2</sup> To be actual notice, the subsequent encumbrancer must be personally informed of the specific prior lien before his rights as a lien-creditor attached: notice to his counsel is not sufficient.<sup>3</sup> Yet it has been held that a judgment entered on the appearance-docket, but not on the judgment-docket, may be disregarded by the sheriff in distribution unless expressly brought to his notice.<sup>4</sup> The entry on the judgment-docket, and in the judgment-index, should be specific and certain.<sup>5</sup> And a judgment entered against partners in the firm name without setting out the Christian names of the partners, is without effect as a lien against subsequent purchasers and lien-creditors without notice.<sup>6</sup>

The plaintiff may be prejudiced by an entry in the judgment-docket of an amount less than the actual debt,<sup>7</sup> but cannot be benefited by an entry of more than is due.<sup>8</sup> So the entry of an amount less than the actual debt in the appearance-docket binds the creditor, and cannot be corrected by the entry of the actual debt in the judgment-docket.<sup>9</sup> A subsequent purchaser or judgment-creditor may look beyond the judgment-docket to correct a mistaken entry, but he is not bound to do so.<sup>10</sup>

The judgment-docket is *prima facie* evidence of the order in which liens are entered.<sup>11</sup> Judgments entered on the same day are payable *pro rata*.<sup>12</sup>

An interlocutory judgment is in general not a lien: such as a judgment in case for want of an appearance, or a judgment by default in *assumpsit*: such judgments only become final and bind defendant's land when the amount is liquidated by an assessment of the damages.<sup>13</sup> It is otherwise in debt;<sup>14</sup> or where the plaintiff's demand is in the nature of a debt which may be ascertained by mere calculation.<sup>15</sup>

An award under the Amicable Arbitration Law of 1836<sup>16</sup> creates no lien until judgment absolute be entered upon it (the entry of judgment *nisi* does not constitute a lien); unless this is done, a *scire facias* on the award will not create a lien as against subsequent judgment-creditors without notice.<sup>17</sup> And an award under the

<sup>1</sup> York Bank's Appeal, 12 Casey 458.

<sup>2</sup> Ibid.; Stephen's Appeal, 2 Wright 9; Smith's Appeal, 11 Ibid. 128.

<sup>3</sup> Smith's Appeal, 11 Wright 128.

<sup>4</sup> Mann's Appeal, 1 Barr 24.

<sup>5</sup> See the requisites. Act 29th March 1827, § 3, 9 Sm. Laws 319; Purd. Dig. 575, pl. 21.

<sup>6</sup> Smith's Appeal, 11 Wright 128.

<sup>7</sup> Crutcher v. Commonwealth, 6 Whart. 340; McCleary's Appeal, 1 W. & S. 299.

<sup>8</sup> Hance's Appeal, 1 Barr 408.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.; Ridgway's Appeal, 3

Harris 177.

<sup>11</sup> Polhemus's Appeal, 8 Casey 328.

<sup>12</sup> Metzler v. Kilgore, 3 Pa. R. 246.

<sup>13</sup> Phila. Bank v. Craft, 16 S. & R. 347; Phillips v. Hellings, 5 W. & S. 44.

<sup>14</sup> Commonwealth v. Baldwin, 1 Watts 56.

<sup>15</sup> Lewis v. Smith, 2 S. & R. 142, 155.

And see McCune v. Hogan, 3 Pittsburgh L. J. 70; Stephen's Appeal, 2 Wright 9; Sellers v. Burk, 11 Wright 344.

<sup>16</sup> Act 16th June 1836, Purd. Dig. 50, 51, Pamph. L. 717.

<sup>17</sup> Stephen's Appeal, 2 Wright 9

Act of 1705<sup>1</sup> is perhaps in the same condition, since that act, like the Act of 1836, gives to such award the effect of a verdict. But an award under the Act of 1806,<sup>2</sup> entered by the prothonotary and not excepted to by the opposite party within the time allowed for that purpose, becomes a judgment.<sup>3</sup> So an award under the Compulsory Arbitration Law<sup>4</sup> is a lien upon defendant's estate from the time of entry, unless reversed on appeal or satisfied.<sup>5</sup> The lien of an award like that of a judgment expires in five years unless kept alive by a *scire facias*.<sup>6</sup>

A transcript of a judgment obtained before a justice of the peace may be filed with the prothonotary of the Common Pleas, and docketed by him,<sup>7</sup> when it becomes, as regards real estate, virtually a judgment of the court;<sup>8</sup> but it is a lien only from the time it is actually filed.<sup>9</sup> But a judgment for damages in summary proceedings to obtain possession by a purchaser at sheriff's sale cannot be certified to the Common Pleas, under this act, for the purpose of creating a lien on land.<sup>10</sup>

A report of county auditors, finding a balance due the county by the county treasurer, must be entered on the judgment-docket and indexed, or, though good as a lien against the treasurer, it will be postponed to subsequent judgments properly docketed.<sup>11</sup> So to entitle the Commonwealth to a lien for balance due by a county treasurer upon land of himself and his sureties, as against lien-creditors, a certified copy of the amount must have been transmitted to the prothonotary and entered of record.<sup>12</sup>

*Judgments confessed in preference of creditors.*—So long as a debtor retains dominion over his own property he may prefer a creditor by judgment or by conveyance at a fair price, and such preference is not fraudulent either in law or fact: and it is immaterial whether the conveyance be made to the preferred creditor, or to another under an arrangement to pay the price to creditors designated.<sup>13</sup> If, however, the purpose was not to prefer but to delay creditors, the transaction, in whatever form, would be within the 13 Eliz.; the purpose may be a matter of law for the court, or it may be a matter of inference for the jury.<sup>14</sup> But by the 4th section of the Act of 16th April 1849,<sup>15</sup> judgments confessed to evade the Act concerning Preferences and Assignments,<sup>16</sup> followed by an

<sup>1</sup> Purd. Dig. 53, pl. 14, 1 Sm. Laws February 4th 1854, MS: s. c., 2 Phila. Rep. 71.

<sup>2</sup> Act 21st March 1806, Purd. Dig. 52, 4 Sm. Laws 326.

<sup>3</sup> Section 3, *ubi supra*.

<sup>4</sup> Act 16th June 1836, Purd. Dig. 53, Pamph. L. 719.

<sup>5</sup> Ibid., § 24, Purd. Dig. 55, pl. 31.

<sup>6</sup> Act 21st April 1840, Purd. Dig. 56, pl. 34, Pamph. L. 449. See Vol. II., "Scire Facias."

<sup>7</sup> Act 20th March 1810, § 10, Purd. Dig. 601, pl. 80, 5 Sm. Laws 166.

<sup>8</sup> Brannan v. Kelley, 8 S. & R. 479.

<sup>9</sup> Bratton's Appeal, 8 Barr 164.

<sup>10</sup> Gault v. McKinney, C. P. Phila.,

February 4th 1854, MS: s. c., 2 Phila. Rep. 71.

<sup>11</sup> Snyder County's Appeal, 3 Grant 38.

<sup>12</sup> Arnold's Estate, 10 Wright 277.

<sup>13</sup> Uhler v. Maulfair, 11 Harris 481; Siegel v. Chidsey, 4 Casey 279, overruling Ashmead v. Hean, 1 Harris 584; York Bank v. Carter, 2 Wright 446; Keen v. Kleckner, 6 Ibid. 529.

<sup>14</sup> Lowry v. Coulter, 9 Barr 349, per GIBSON, C. J.

<sup>15</sup> Purd. Dig. 60, pl. 3, Pamph. L. 664.

<sup>16</sup> Act 17th April 1843, § 1, Purd. Dig. 60, pl. 2, Pamph. L. 273.

assignment of real estate, are void as against other creditors, and are not entitled to preference out of the proceeds of such real estate, but are entitled only *pro rata* with the other debts.<sup>1</sup> This, however, only applies where there is an assignment for the benefit of creditors following the confession of a judgment: it is not to be applied so as to deprive a judgment-creditor of a judgment amicably obtained, and to give preference to a subsequent judgment obtained compulsorily, no assignment having been made by the debtor.<sup>2</sup> But a judgment confessed for an amount honestly due is voidable by the defendant's creditors, if it was given and received for the purpose of forcing such creditors into a compromise of their claims, even though it was never used for that purpose.<sup>3</sup> And a voluntary judgment confessed by one not indebted, with a design to defeat a supposed liability which did not exist, is rendered fraudulent as to subsequent creditors, by reviving it by *sci. fa.*, and issuing an execution thereon.<sup>4</sup>

A judgment or mortgage to secure future advances is valid; even, it is said, as against intervening liens entered after the agreement, but before the advances.<sup>5</sup> And advances made on the faith of an antecedent judgment, will have priority over liens attaching subsequently to the date of the advances.<sup>7</sup> But if the plaintiff in the judgment for advances has furnished the second judgment-creditor with a statement of the advances actually made, on the faith of which the latter loaned the defendant the money for which the second judgment was taken, the first judgment-creditor will be estopped from claiming, as against the second, beyond the amount of his own statement.<sup>8</sup> Where the mortgagee was under no obligation to make the advances, his mortgage takes rank as to such advances, and as against other mortgages and judgments, from the date of such advances and not from its own date: in this State, in making future advances, the mortgagee is bound to take notice of prior and intervening recorded encumbrances, just as if he were about to accept a new and independent security from the party.<sup>9</sup> But where the advances were made on consignments of goods to the mortgagee, the proceeds of which were credited to the mortgagor in a general account, it was held, in the absence of appropriation by the parties, that the credits were to be applied first to that part of the advances not secured by the mortgage and to the mortgage-debt thereafter, and that on distribution of the proceeds of a sheriff's sale under the mortgage, a claimant under a judgment, which was prior to a portion of the advances, could not intervene and compel

<sup>1</sup> Summer's Appeal, 4 Harris 169.

<sup>2</sup> Worman v. Wolfersberger's Executors, 7 Harris 59.

<sup>3</sup> Bunn v. Ahl, 5 Casey 387.

<sup>4</sup> Serfoos v. Fisher, 10 Barr 184.

<sup>5</sup> Ter Hoven v. Kerns, 2 Barr 96.

<sup>6</sup> Pennock v. Copeland, D. C. Phila., 1 Phila. Rep. 29. But *semble contra*, unless perhaps where the judgment-creditor was under an obligation to

make advances: Ter Hoven v. Kerns, 2 Barr 96, per KENNEDY, J.

<sup>7</sup> Shenk's Appeal, 9 Casey 371; Hulseman v. Houser, D. C. Phila., 4 Phila. Rep. 118.

<sup>8</sup> Ter Hoven v. Kerns, 2 Barr 96.

<sup>9</sup> Parker v. Jacoby, 3 Grant 301, citing Ter Hoven v. Kerns, *supra*; Appeal of Bank of Commerce, 8 Wright 423.

a different appropriation of the credits, so that the indebtedness existing at the entry of his judgment should be thereby discharged, leaving the mortgage to cover only the last items of the consignee's account, which were advances subsequent to the entry of that judgment.<sup>1</sup> But where a mortgage was given to a bank as collateral security for the payment of notes discounted or to be discounted for the benefit of the mortgagor, it could not prevail against a judgment subsequent to the mortgage, but prior to discounts of notes to the mortgagor, unless it were shown that the last notes discounted were but renewals of the original notes discounted before the entry of the judgment.<sup>2</sup>

The judgment-bond of a married woman is absolutely void, though given for debts contracted before marriage, or for necessities for the support and maintenance of her family,<sup>3</sup> or for money loaned to her and applied for the purchase of real estate for her sole and separate use,<sup>4</sup> or for a debt contracted for the improvement of her real estate.<sup>5</sup> In general, a married woman is incapable of contracting debts: the cases in which she is liable are *torts*, debts contracted before marriage, expenses necessarily incurred in the management of her estate, and necessities for the support of her family.<sup>6</sup> But she is not liable for a debt contracted for the improvement of her estate, unless it were shown that the money was applied for that object.<sup>7</sup> Her separate estate, if liable for debts thus contracted, must be reached through the proper form of action, and not by means of instruments declared to be null and void.<sup>8</sup> But she may purchase land and give a judgment for the purchase-money.<sup>9</sup> Such judgment is invalid as a personal obligation, but the purchase-money is a valid lien.<sup>10</sup> She may agree to revive a judgment on bond given before marriage,<sup>11</sup> and she may enter satisfaction on a judgment given to her while sole.<sup>12</sup>

She is to own, use, and enjoy her property as if it had been settled to her sole and separate use during coverture.<sup>13</sup> She cannot sell or encumber during the lifetime of her husband, real estate held to her sole or separate use, with or without a trustee, unless that power was especially given by the instrument under which she acquired her title.<sup>14</sup>

A judgment confessed by a husband in favor of his wife, for the amount of her share of her father's estate, received by him after the passage of the Act of 1848, is valid.<sup>15</sup> Where a husband receives his wife's money, the presumption of law is that he receives

<sup>1</sup> Johnson's Appeal, 1 Wright 268; Hulseman v. Houser, D. C. Phila., 4 Phila. Rep. 118.

<sup>2</sup> Appeal of Bank of Commerce, 8 Wright 423.

<sup>3</sup> Glyde v. Keister, 8 Casey 85; s. c., 1 Grant 465.

<sup>4</sup> Keiper v. Helfricker, 6 Wright 325.

<sup>5</sup> Bruner's Appeal, 11 Wright 67.

<sup>6</sup> Mahon v. Gormley, 12 Harris 83.

<sup>7</sup> Heugh v. Jones, 8 Casey 432.

<sup>8</sup> Keiper v. Helfricker, 6 Wright 325.

<sup>9</sup> Patterson v. Robinson, 1 Casey 81; Ramborger's Administrators v. Ingraham, 2 Wright 146.

<sup>10</sup> Ibid.

<sup>11</sup> Bruner's Appeal, 11 Wright 67.

<sup>12</sup> Eckert v. Lewis, C. P. Bucks, 4 Phila. Rep. 422.

<sup>13</sup> Bear's Administrator, v. Bear, 9 Casey 529.

<sup>14</sup> Wright v. Brown, 8 Wright 224.

<sup>15</sup> Mellinger's Administrator v. Bauerman's Trustee, 9 Wright 522.

it for her.<sup>1</sup> But this is not true of her money received by him before the Act of 1848, unless he expressly agreed to repay.<sup>2</sup> Where the proof was clear that he had received her money, and the sole question was whether she had given it to him, the gift to her of notes by him at the time or soon after the money was received, was a circumstance to repel the presumption of a gift.<sup>3</sup> A judgment, admitted to be unobjectionable in point of honesty, given by a husband to his wife to secure her separate estate, will not in a question of mere distribution be treated as void in law or equity because of the legal unity of the parties: the relation not appearing in the record, the court will not at the instance of creditors inquire into the fact of coverture, when no fraud is alleged.<sup>4</sup> But where a judgment is given by a husband to secure money of his wife, part of which was received by him prior to the Act of 1848, such judgment is good for so much as was received by him since the passage of that act, and void for that portion received by him before that time, unless at the time of the receipt he had expressly agreed to repay.<sup>5</sup>

Where a judgment confessed was entered up in a certain county in violation of an express parol agreement to the contrary, it is nevertheless valid unless the debtor objects; and if he takes no steps to correct the irregularity, it is binding upon him and all other persons.<sup>6</sup>

A mortgage by a lunatic is voidable, and cannot be enforced against the mortgagor, even where the delusion under which he is laboring is confined to one class of subjects and does not impair his power of transacting business.<sup>7</sup>

*Discharge of judgments.*—A judgment ceases to bind land and to be entitled to any part of the proceeds thereof, when it has been in any way discharged, as by payment, &c. The mere sale of real estate does not satisfy the judgment under which the sale is made, or so much thereof as the proceeds amount to: the credit depends on the right to the fund.<sup>8</sup> Nor does the receipt of the purchase-money by the sheriff *per se*, discharge a prior judgment *pro tanto*.<sup>9</sup> And a levy on personal property, without removal or sale of the goods, does not discharge the lien of the judgment on real estate of the defendant or affect its priority.<sup>10</sup> So, where the sheriff neglected to levy, and suffered defendant to dispose of the goods.<sup>11</sup> So the return of "levied" on personal property is not conclusive evidence of satisfaction, and does not debar the plaintiff from coming on the proceeds of the defendant's land, where the personal property had been delivered to the defendant on a forthcoming bond but not returned to the sheriff.<sup>12</sup> So, where the the plaintiff withdraws an

<sup>1</sup> Mellinger's Administrator v. Bausman's Trustees, 9 Wright 522; Grabill v. Moyer, 9 Wright 530.

<sup>2</sup> Gicker's Administrators v. Martin, 14 Wright 138.

<sup>3</sup> Grabill v. Moyer, 9 Wright 530.

<sup>4</sup> Williams's Appeal, 11 Wright 307.

<sup>5</sup> Gicker's Administrators v. Martin, 14 Wright 138.

<sup>6</sup> Fullerton's Appeal, 10 Wright 144.

<sup>7</sup> Cook v. Parker, D. C. Phila., 4 Phila. Rep. 265. But the money lent may be recovered by an innocent lender in *indebitatus assumpsit*: Ibid., per HARE, J.

<sup>8</sup> Troutman's Appeal, 11 Harris 491.

<sup>9</sup> Bank of Pa. v. Winger, 1 Rawle 295.

<sup>10</sup> Morrison v. Hoffman, 1 Barr 13; Cummins's Appeal, 9 W. & S. 73.

<sup>11</sup> Moore's Appeal, 7 W. & S. 28.

<sup>12</sup> Taylor's Appeal, 1 Barr 390.

execution levied on defendant's goods.<sup>1</sup> But where a levy was made under two executions, and the sheriff refused to sell the goods, if the senior execution-creditor had a right of action against the sheriff for the value of the goods, this was a satisfaction *pro tanto*, and as against other judgment-creditors, he was debarred to that extent from coming on the proceeds of the land.<sup>2</sup> A seizure of goods in execution to the value of the debt, whether they have been sold or not, satisfies the judgment if they have by the seizure been *lost to the debtor*, unless, in case of a sale, the proceeds be swept away by a prior lien.<sup>3</sup>

So, where the plaintiff has judgment against two, and has extended the lands of one, which remain in defendant's possession, he is not estopped from claiming the amount of his judgment out of the proceeds of land of the other.<sup>4</sup> So, where the land of defendant was found by the inquisition sufficient to pay the debt in seven years, but no further proceedings were taken, it seems the plaintiff may claim out of the proceeds of that or any other tract when sold upon any other execution.<sup>5</sup>

A person who at the sheriff's sale represented that a certain judgment was paid, is bound by such statement if incorrect and injurious, though he was not then the owner of the judgment but purchased it subsequently.<sup>6</sup>

Where a vendor under articles, after entering a judgment by confession from his vendee for the balance of the purchase-money, then conveyed to his vendee the legal title by deed, acknowledging the receipt of the purchase-money, and releasing "all his estate, right, title, interest, claim, and demand whatsoever in law or equity," in and to the land, concluding with a general warranty; he was not estopped by his deed from setting up his prior judgment against subsequent judgment-creditors of his vendee, for estoppels *by deed* avail only in favor of parties and privies; and a judgment-creditor has no privity of estate with his debtor: but the vendor having so acted as to induce the belief that he had no further claim upon the land, and the subsequent judgment-creditors having given credit to the vendee upon the faith of the existence of such a state of facts, this constituted an estoppel *in pais* of which such judgment-creditors could avail themselves.<sup>7</sup> But where a vendor, having a judgment against his vendee's interest, conveys the legal title to a stranger

<sup>1</sup> Cathcart's Appeal, 1 Harris 416.

<sup>2</sup> Hamner v. Griffith's Administrator, 1 Grant 193.

<sup>3</sup> Campbell's Appeal, 8 Casey 91, 92. And see the opinion of the court as to the effect of a levy on personalty as regards the lien of the judgment upon the land.

<sup>4</sup> Slater's Appeal, 4 Casey 169.

<sup>5</sup> Taylor's Appeal, 1 Barr 390.

<sup>6</sup> Bitting's Appeal, 5 Harris 211.

<sup>7</sup> Waters's Appeal, 11 Casey 523. In this case the judgment was on the docket unsatisfied, and might therefore be supposed to be notice to all the

world of the vendor's claim. Had the purchase-money been secured by a mortgage, instead of a judgment, the effect in question would never have been ascribed to the deed, no matter how absolute its terms, and even though no reference was made therein to the mortgage: Eldridge v. Christy, D. C. Phila., 17 Leg. Int. 236; s. c., 4 Phila. Rep. 102. And perhaps if the judgment had been entered contemporaneously with the conveyance, instead of before it, the effect would have been different. See Cake's Appeal, 11 Harris 186.

with covenant of warranty, the lien of his judgment upon the equitable title is not thereby destroyed so as to let in subsequent judgment-creditors, although he intended that his deed should be a complete conveyance.<sup>1</sup>

Where the plaintiff arrests the defendant upon a *ca. sa.*, he relinquishes the lien of his judgment upon the defendant's lands, and if other creditors take those lands in execution and sell them, and then the defendant is discharged by the Insolvent Act, the plaintiff cannot turn round and resort to the proceeds of the lands which had been taken by the other creditors.<sup>2</sup> A *ca. sa.* executed, amounts, during the confinement of the debtor, to a discharge of the debt, but if the defendant be discharged by act of law, as under the Insolvent Act, it is not a satisfaction of the debt unless the plaintiff consented to the discharge.<sup>3</sup>

A voluntary discharge by the plaintiff extinguishes the debt.<sup>4</sup> But the plaintiff may discharge the defendant on a *ca. sa.*, and retain the lien of his judgment by express stipulation.<sup>5</sup>

A prior judgment-creditor may waive his priority in favor of a subsequent one without extinguishing his judgment, which may be satisfied out of any other lands bound by it.<sup>6</sup>

Notice given by a judgment-creditor of T., at a sheriff's sale of a leasehold interest as the property of R., that it was not really the property of R. but of T., and that his judgment was a lien on it as such, is not an election to resort to that fund for payment, and a waiver of his right to another fund on which he has a good claim, and which is available for the payment of his debt.<sup>7</sup>

Where a prior judgment appeared from the record to be satisfied at the time of the sale, the surety therein, who had paid it, cannot come in after the sale on the subsequent judgment, and claim to be subrogated to the rights of the plaintiff in the older judgment as against the plaintiff in the judgment on which the sale was made.<sup>8</sup>

*After-acquired land.*—The law in this State is settled that a judgment does not bind after-acquired land of the defendant,<sup>9</sup> except where he had previously acquired an equitable title, under articles, and, after the entry of the judgment, becomes legally seised.<sup>10</sup> But the exception does not include the case of one who has purchased a life estate, and after judgment against him purchases the fee by a separate and independent contract.<sup>11</sup> If, however, land was acquired by defendant after judgment against him, and an execution is issued on such judgment, and levied on the after-acquired land, and the

<sup>1</sup> Post's Appeal, 3 Wright 328.

<sup>2</sup> Freeman v. Ruston, 4 Dallas 214, as explained by TILGHMAN, C. J., in Sharpe v. Speckenagle, 3 S. & R. 465.

<sup>3</sup> Sharpe v. Speckenagle, 3 S. & R. 466, TILGHMAN, C. J.

<sup>4</sup> McFadden v. Parker, 4 Dallas 275. See Palethorpe v. Leshner, 2 Rawle 272.

<sup>5</sup> Jackson v. Knight, 4 W. & S. 412.

<sup>6</sup> Bank of Pa. v. Winger, 1 Rawle 295.

<sup>7</sup> Stiles v. Bradford, 4 Rawle 394.

<sup>8</sup> Douglass's Appeal, 12 Wright 225. And see *post*, pp. 1059, 1061.

<sup>9</sup> Rundle v. Ettwein, 2 Yeates 23; Colhoun v. Snider, 6 Binn. 135. And see the cases collected in 5 Am. Law Reg. 513.

<sup>10</sup> Richter v. Selin, 8 S. & R. 425; Foster's Appeal, 3 Barr 79. And see the cases collected in 5 Am. Law Reg. 515.

<sup>11</sup> Dennison's Appeal, 1 Barr 201.

land sold, the plaintiff in the execution will be entitled to the proceeds in preference to claimants whose judgments attached after the land was acquired.<sup>1</sup> And in Philadelphia, after a levy on after-acquired land, the plaintiff may have the execution certified to the office of the court, and docketed on the judgment-index, whereupon it becomes a lien for five years, like other judgments; and the levy is no lien unless thus certified and indexed.<sup>2</sup>

*Expired judgment.*—The lien of a judgment upon land expires in five years from its date, unless it is revived.<sup>3</sup> The levy on and extent of land, and its acceptance by the defendant at the valuation, will not operate to continue the lien of the judgment under which the execution was issued beyond the statutory period of five years, unless it be duly revived by *sc. fa.*<sup>4</sup> And where the plaintiff, after levying on land, took no further proceedings, except by receipting for payments by defendant on account, and the period of five years having in the mean time expired, the land was sold under a subsequent judgment, the first judgment-creditor cannot claim the proceeds on the ground that his levy created a lien; no such thing exists in this State as a lien of a levy independent of the lien of the judgment.<sup>5</sup> So the lien of decedent's debts will expire, if not continued by suit, &c., within five years after his decease.<sup>6</sup>

*Assigned judgments.*<sup>7</sup>—A purchaser of a judgment, accompanied or followed by a transfer on the record, will pass the title to such judgment as against a prior purchase not entered of record, and of which the second purchaser had no notice.<sup>8</sup> So where a moiety of a judgment, which was entered on a bond and warrant, is assigned, but the bond is left in the hands of the assignor, the amount of the assignee's interest must be marked on the record, otherwise a subsequent *bond fide* assignee of the bond, without notice of the prior assignment, will be entitled to the proceeds.<sup>9</sup> And an assignment of a judgment on record is not constructive notice thereof to the debtor; and hence payment by him to the original plaintiff before actual notice of the assignment is good.<sup>10</sup>

And where the assignment is not recorded, payment to the original plaintiff by the vendee of the land is good, and will discharge the lien of the judgment.<sup>11</sup> In such case the holder of the judgment can recover the amount paid from the sureties of the original plaintiff, who was assignee for the benefit of the creditors of the defendant, and had in that capacity sold the land.<sup>12</sup>

But where a third party pays the amount of a judgment, with the intention of holding it for his own use, although no transfer is taken, it is not a payment and satisfaction of such judgment.<sup>13</sup> The essential difference between purchase and payment depends upon the

<sup>1</sup> Packer's Appeal, 6 Barr 277; Lea v. Hopkins, 7 Barr 492.

<sup>2</sup> Act 20th April 1853, § 9, Purd. Dig. 440, pl. 57, Pamph. L. 611.

<sup>3</sup> See Vol. II., "Scire Facias to revive Judgments."

<sup>4</sup> Stephens's Executor's Appeal, 2 Wright 9.

<sup>5</sup> Jameson's Appeal, 6 Barr 280.

<sup>6</sup> Kittera's Estate, 5 Harris 422.

<sup>7</sup> See *ante*, 666.

<sup>8</sup> Campbell's Appeal, 5 Casey 401.

<sup>9</sup> Fisher v. Knox, 1 Harris 622.

<sup>10</sup> Henry v. Brothers, 12 Wright 70.

<sup>11</sup> Patterson's Appeal, 12 Wright 342.

<sup>12</sup> *Ibid.*

<sup>13</sup> Campbell's Appeal, 5 Casey 401.



intention of the parties at the time ; but payment by a stranger to the obligation, or by one whose liability was secondary, is *prima facie* a purchase.<sup>1</sup>

A judgment paid by a surety, whether voluntarily or by execution, will be ordered to stand for his use, in preference to a subsequent lien, although the sheriff's return to the execution, after payment by the surety, was "money made."<sup>2</sup> And a surety for stay of execution may purchase the judgment from the plaintiff, and have it marked to his use, and will then be preferred to another judgment-creditor, whose judgment was subsequent to the entry of the stay of execution.<sup>3</sup> This is a different case from that of bail for stay, &c., who pays off the judgment by reason of his liability, takes an assignment, and claims to be subrogated as surety.<sup>4</sup> In the latter case, where the judgment assigned to the bail was for arrears of ground-rent, it will not have priority over a subsequent judgment for later arrears.<sup>5</sup>

*Set-off.*—On the distribution the court has an equitable jurisdiction to set off one judgment against another, independently of the Statutes or Defalcation Act.<sup>6</sup> It will not exercise this equitable power unless the adverse parties have judgments against each other for their respective claims.<sup>7</sup> And the equitable right to set off judgments is permitted only where it will infringe on no other right of equal grade ; consequently it will not be allowed where the plaintiff's judgment against the defendant had been assigned to a *bona fide* holder for value before the judgment of the defendant against the plaintiff was obtained.<sup>8</sup> So, where the plaintiff's judgment against the defendant had been assigned of record to a third party one month before the defendant procured to be assigned of record to himself a judgment of a stranger against the plaintiff, the set-off will not be allowed, although the suggestion of the use in the latter assignment recited that it had been made two years before.<sup>9</sup> Even if the assignment had been made at the time stated in the suggestion, it could not affect a *bona fide* assignee of the other judgment without notice of it.<sup>10</sup> And the assignee of the plaintiff's judgment could not be compelled, by notice merely, to prove the consideration for his assignment when it was neither pleaded nor shown by evidence to have been fraudulent or voluntary, nor so alleged in the petition for the set-off, nor was any issue prayed for in which the question might have been heard.<sup>11</sup>

<sup>1</sup> *Litcap v. Wilt*, D. C. Phila., 4 Phila. Rep. 64.

<sup>2</sup> *Oneil v. McClure*, 1 Am. L. J. 225.

<sup>3</sup> *Hartman's Appeal*, 6 Barr 76.

<sup>4</sup> *Ibid.* See cases cited *arguendo*.

<sup>5</sup> *Fassitt v. Middleton*, 11 Wright 214. And for the covenant implied in assignment of a judgment, see the opinion of the court, *Ibid.* See also as to the power of an attorney to assign his client's judgment, *Ibid.*

<sup>6</sup> *Ramsey's Appeal*, 2 Watts 228 ; *Coates's Appeal*, 7 W. & S. 99.

<sup>7</sup> *Cornwell's Appeal*, 7 W. & S. 305.

<sup>8</sup> *Ramsey's Appeal*, 2 Watts 228, as explained by KENNEDY, J., in *Filbert v. Hawk*, 8 Watts 447.

<sup>9</sup> *Horton v. Miller*, 8 Wright 256.

<sup>10</sup> *Ibid.*, 258.

<sup>11</sup> *Ibid.* This case did not arise upon distribution, but was a rule to show cause why the one judgment should not be defalked against the other. It was held that in such case the question should have been carried up to the Supreme Court by appeal, and not by writ of error.

*Subrogation* is the substitution of one creditor to the rights of another. Being founded on pure equity, subrogation will not be allowed to a party who is indebted to the judgment-debtor, against whom he asks to be substituted as plaintiff, without his first satisfying such debt.<sup>1</sup> The principle of subrogation is that he who may at law control the application of two or more funds shall not be suffered to use his legal advantages in a way to exclude the demand of a fellow-creditor whose legal recourse is to but one of them.<sup>2</sup> In such case the court will intervene, and either compel the party to exhaust first the fund on which he has the exclusive lien,<sup>3</sup> or will subrogate the other party to the rights of the former against such fund.<sup>4</sup> When one has a judgment against two tracts he may select which he will proceed against first if one be insufficient; but when the proceeds are brought into court and there are contending claimants, it will be distributed according to pure equity.<sup>5</sup>

Thus if one of several tracts which are subject to a common encumbrance be aliened by the debtor, the rule in equity is that the tracts still remaining in him are first liable to discharge the encumbrance; in such case, a creditor, whose lien covered all the tracts, having levied on and sold those remaining in the debtor, a junior encumbrancer, whose lien bound the tracts levied on but not the one previously aliened, is not entitled to subrogation to the lien of the first creditor against the tract so aliened; and it made no difference that the alienee had not paid the whole of the purchase-money if he had obtained the title.<sup>6</sup> But where a mortgagor had other lands than the mortgaged premises, which together with the latter were bound by earlier judgments, and such judgments were afterwards paid out of the proceeds of a sheriff's sale of a portion of the mortgaged premises, the mortgagee has a right to be subrogated to the lien of the judgments against the land not mortgaged, for the mortgage carried with it an equitable right to have the paramount judgments first satisfied out of lands not included in it: and it is no objection to such claim for subrogation that the mortgagee had taken a judgment-note with the mortgage, and failed to enter it up, nor that considerable sums had been paid by the mortgagee to the mortgagor for services, for a right of way, and for lumber manufactured out of timber obtained from the land.<sup>7</sup>

Subrogation is founded in equity, and is not to be allowed except in a clear case, and where it works no injustice to the rights of others.<sup>8</sup> It will never be allowed in favor of a junior lien-creditor, not a surety, to the prejudice of intervening rights: both funds must be in the hands of the common debtor of both creditors, or where the funds belong to different persons, the one not taken must

<sup>1</sup> Coates's Appeal, 7 W. & S. 99.

<sup>2</sup> Ramsey's Appeal, 2 Watts 232.

<sup>3</sup> Hastings' Case, 10 Watts 304. See *Lea v. Hopkins*, 7 Barr 492; *Bruner's Appeal*, 7 W. & S. 269.

<sup>4</sup> Ramsey's Appeal, 2 Watts 228; *Dunn v. Olney*, 2 Harris 219.

<sup>5</sup> Hastings' Case, 10 Watts 303.

<sup>6</sup> Lloyd v. Galbraith, 8 Casey 103.

Nor could he compel the prior judgment-creditor to proceed first against the tract so aliened: *Bruner's Appeal*, 7 W. & S. 269. See *Ziegler v. Long*, 2 Watts 206; *Cowden's Estate*, 1 Barr 267.

<sup>7</sup> Canal Co.'s Appeal, 2 Wright 512.

<sup>8</sup> McGinnis's Appeal, 4 Harris 445;

*Lloyd v. Galbraith*, 8 Casey 103.

be that which in equity was primarily liable.<sup>1</sup> Hence where judgments were transferred to another county, and there paid out of the proceeds of defendant's lands, a judgment entered in the latter county is not to be subrogated to the lien of the transferred judgments in the county where they originated, if such subrogation would prejudice a judgment entered there subsequently to the entry of the judgments afterwards transferred, but before the date of the judgment sought to be substituted.<sup>2</sup> And where the vendee of one of several tracts bound by a judgment, gave in part payment a note for an amount equal to the due proportion of the judgment to be borne by the tract so purchased, but the whole judgment was afterwards paid out of the proceeds of vendor's other lands, subsequent judgment-creditors of vendor have no right to be subrogated to the claim against the vendee to the prejudice of judgment-creditors of vendee.<sup>3</sup>

Where an administrator or assignee advances money to complete the purchase of the trust estate, or to pay a lien thereon, he is entitled to stand in the place of the creditor he has paid.<sup>4</sup> So where real estate, taken by one of the heirs under a recognisance, is sold under a judgment against the recognisor, the guardian of other heirs who has paid them the amount of their shares secured by the recognisance, is in equity entitled to subrogation on the recognisance as against the judgment-creditors of the recognisor.<sup>5</sup>

But where a fund specifically devised to legatees was appropriated to payment of decedent's debts, the specific legatees could not claim a lien on the land in right of the creditors so paid, where the lien of the debts to which they claimed to be subrogated had expired.<sup>6</sup> So where at the time of the sheriff's sale it appeared from the record that a prior judgment against the defendant was satisfied, the surety of defendant who had paid such judgment cannot claim to be subrogated to the rights of the plaintiff therein as against the creditor under whose judgment the land was sold.<sup>7</sup> These last points were decided on the ground that there was no right to which the claimant could be subrogated, the lien in one case having expired, and in the other having been satisfied of record, at the time of the sale, which is the time at which the rights of claimants must be ascertained.<sup>8</sup>

Where land, bound by a judgment given as an indemnity to a surety, is sold under a subsequent judgment against the principal, the proceeds cannot be awarded to the surety without prejudicing the principal who would be deprived of the means of paying the debt, nor to the principal, or the plaintiff in the subsequent judgment, without depriving the surety of his indemnity; and must

<sup>1</sup> McGinnis's Appeal, 4 Harris 445; Lloyd v. Galbraith, 8 Casey 103.

<sup>2</sup> McGinnis's Appeal, 4 Harris 445.

<sup>3</sup> Ebenhardt's Appeal, 8 W. & S. 327, SERGEANT, J., diss. Affirmed in Lloyd v. Galbraith, 8 Casey 103.

<sup>4</sup> Robb's Appeal, 5 Wright 45, citing and affirming McCurdy's Appeal, 5 W. & S. 397; Greiner's Estate, 2 Watts 414; Wallace's Appeal, 5 Barr 103.

<sup>5</sup> Kelchner v. Forney, 5 Casey 47.

<sup>6</sup> Mellon's Appeal, 10 Wright 165.

<sup>7</sup> Douglass's Appeal, 12 Ibid. 223.

<sup>8</sup> See Ibid. If the surety paying a judgment wished to be subrogated to the rights of the plaintiff against his principal, he should have taken an assignment of it, instead of allowing it to be satisfied.

therefore be applied to the payment of the debt for which the surety has become answerable, as the only mode of disposing of them consistent with equity.<sup>1</sup> So when the proceeds of a sheriff's sale of the land of a surety have been applied to pay the judgment against the principal, the other judgment-creditors of the surety have a right to be subrogated to the lien of the judgment against the principal, and have priority of claim in the order of their respective judgments to the extent that they were injured by such application of the proceeds of their debtor's land: this equity is limited to the balance of the general accounts, when stated, between the principal and surety, and will be destroyed by the creditors having received money belonging to the surety which might have been applied to the satisfaction of their lien: but where all the liens on the surety's land, existing at the time it was sold to pay the principal's debt, have been satisfied, the debt of the principal to the surety is an ordinary debt, and subsequent judgment-creditors of the surety have no right to be subrogated.<sup>2</sup> And a judgment against defendant as surety must be paid out of proceeds, although it may appear that the same judgment is a lien upon the real estate of the principal which is sufficient for its payment: the remedy of subsequent judgment-creditors of the surety is by subrogation.<sup>3</sup>

If after judgment entered jointly against two, one of whom is named in the record as surety, a third person intervene, solely on request of the principal, and become bail for stay of execution, taking indemnity from him therefor; and on the expiration of the stay the surety be compelled to pay the judgment, he is entitled to subrogation thereto, and may recover therein against the bail.<sup>4</sup>

3. *The order of payment.*—In general liens are entitled to be paid out of the proceeds in the order of their date, though, as will be seen presently, this order is sometimes departed from.

*Judgments and mortgages*, when the latter are discharged by the sale, stand upon precisely the same footing, and are payable in the order of their priority.<sup>5</sup>

The judgment-docket is at least *prima facie* evidence of the order in which liens are entered therein.<sup>6</sup> The prothonotary may perform official acts at unseasonable hours, though not bound to do so, and it is competent for him to receive and file a warrant of attorney at his residence after office hours, and to enter judgment thereon, and if such judgment be docketed the next day as of the day when filed, it becomes a lien as of that date.<sup>7</sup>

Where a judgment and mortgage, or two judgments, are entered on the same day, they are payable *pro rata*.<sup>8</sup> And in a contest between judgments, or a judgment and mortgage, parol evidence is inadmissible to show the precise time of the day when a judgment

<sup>1</sup> Worrall v. Worrall, D. C. Phila., 18 Leg. Int. 29; s.c., 4 Phila. Rep. 253. This case shows the purely equitable nature of proceedings in distribution.

<sup>2</sup> Neff v. Miller, 8 Barr 347.

<sup>3</sup> Neff's Appeal, 9 W. & S. 36.

<sup>4</sup> Schnitzel's Appeal, 13 Wright 23.

<sup>5</sup> Lindle v. Neville, 13 S. & R. 227.

<sup>6</sup> Polhemus's Appeal, 8 Casey 328.

<sup>7</sup> Ibid.

<sup>8</sup> Claason's Appeal, 10 Harris 359; Hendrickson's Appeal, 12 Ibid. 363; Lanning v. Pawson, 2 Wright 480; Clawson v. Eichbaum, 2 Grant 130.

was entered.<sup>1</sup> But in a contest between a judgment and a conveyance fractions of a day are counted, and the rule is "first in order first in right."<sup>2</sup>

Where there was an arrangement between the parties to a mortgage that it should be entered so as to have priority over a judgment about to be confessed by mortgagor, but through mistake the entries were made as of the same day, the mortgagee should at an early day have applied to restrain the operation of the judgment, or have notified the judgment-creditors of his claim: a delay of two years, till after sale of defendant's real and personal estate, will forfeit his claim to priority.<sup>3</sup> And a verbal agreement between the parties that a mortgage should have priority over a judgment entered on the same day, though binding on the parties, is not binding on an assignee of the judgment without notice.<sup>4</sup>

Where a single claim, a lien on land, is separated by assignments of portions thereof to different persons, the assignees may claim *pro rata* out of the proceeds of a sale of the land which discharges the lien. Thus,<sup>5</sup> where a verdict had been obtained for arrears of an annuity charged upon land, but judgment was not entered before the sale of the land under a judgment for subsequent arrears, which had been assigned to a stranger, such assignee is not entitled to the whole proceeds, but must come in *pari passu* with the annuitant's claims for arrears in the first suit, and for arrears accruing between the judgment and the sheriff's sale.<sup>5</sup> In this State the assignment of a judgment does not imply any covenant or warrant that it will be paid.<sup>6</sup>

So where several bonds have been given for the instalments due on a mortgage, and some of them have been assigned by the mortgagee on a sheriff's sale of the mortgaged premises for a sum not sufficient to pay the whole mortgage-debt, the bonds are payable *pro rata* out of the proceeds: there is no priority among the assignees, and no equity in their favor as against the mortgagee.<sup>7</sup> And this principle applies where several mortgages, covering the same land, and executed and recorded at the same time, have been created for the several instalments of the debt, and some of them were afterwards assigned.<sup>8</sup> But where there are several judgments for the instalments of the purchase-money of land, which were entered at different times, and are all held by the vendor, and the equitable interest of the vendee is sold in proceedings by the vendor under the judgment for the third instalment, the proceeds must be applied to the several judgments in the order of their priority, and not *pro rata*, nor at the election of the plaintiff; and therefore if the

<sup>1</sup> Ibid.; Lanning v. Pawson, 2 Wright 480. But facts *in pais*, out of which other rights have arisen before the entry of the judgment, may be shown by parol: Ibid.

<sup>2</sup> Clawson v. Eichbaum, 2 Grant 130.

<sup>3</sup> Claason's Appeal, 10 Harris 359.

<sup>4</sup> Hendrickson's Appeal, 12 Ibid. 363.

<sup>5</sup> Mohler's Appeal, 5 Barr 418, affirm-

ing Donley v. Hays, 17 S. & R. 400.

<sup>6</sup> Ibid.

<sup>7</sup> Donley v. Hays, 17 S. & R. 400; Cowden's Estate, 1 Barr 278; Mohler's Appeal, 5 Barr 420; Betz v. Heebner, 1 Pa. R. 280; Carneghan v. Brewster, 2 Barr 43; Yarnal's Appeal, 3 Ibid. 364; Bank v. Chester, 1 Jones 290.

<sup>8</sup> Perry's Appeal, 10 Harris 43.

proceeds are sufficient to cover the second judgment, a security for stay of execution on that judgment is discharged.<sup>1</sup>

Where encumbrances have been created on different tracts at different times, they must be paid according to the order in which they were created; that is, all the moneys arising from the sale of the part first encumbered must be applied first to the payment of the encumbrances on that part, and so on.<sup>2</sup>

*Preferred liens.*—The general rule that liens entitled to participate in the distribution are to be paid in the order of their respective dates, has several exceptions. Certain kinds of liens have an absolute priority of payment, irrespective of date, conferred upon them by statute: such are taxes, municipal claims, and wages in certain counties. Other kinds of liens have a qualified priority, dependent upon their nature and circumstances, and based sometimes upon legislative enactment, sometimes upon judicial decision. These will be explained hereafter.

*Taxes and municipal claims in Philadelphia.*—As we have already seen, these have a priority by the Act of 1824, which enacts that "all taxes, rates, and levies which may hereafter be lawfully imposed or assessed, to be applied for any purposes, either in the city or county of Philadelphia, on real estate situate in the said city and county of Philadelphia, shall be and are hereby declared to be a lien on the said real estate, on which they may be hereafter imposed or assessed, together also with all additions to and charges on the said taxes, rates, and levies, which, by the provisions of this act, are directed to be made; and the said lien shall have priority to, and shall be fully paid and satisfied before any recognisance, mortgage, judgment, debt, obligation, or responsibility which the said real estate may become charged with or liable to, from and after the passage of this act."<sup>3</sup> This includes all taxes, rates, and levies imposed or assessed by the authority of the city of Philadelphia, or any municipal corporation in the city or county of Philadelphia, upon real estate situate therein, except water-rents.<sup>4</sup> A municipal claim for paving is included,<sup>5</sup> but such claim is not a tax within the Act of 16th April 1838, § 29, exempting churches, &c., from taxes,<sup>6</sup> and need not be registered in the manner prescribed by the Act of 1824 for the registry of unpaid taxes.<sup>7</sup> And a municipal claim authorized by subsequent legislation is within the protection of the act.<sup>8</sup> But it did not include state taxes,<sup>9</sup> but was extended to them by the Act of 16th April 1845, § 2.<sup>10</sup>

Under the Act of 1824 taxes assessed on real estate in Philadelphia are a lien from the date of assessment, and have priority in payment over antecedent mortgages and other encumbrances.<sup>11</sup> Taxes

<sup>1</sup> *Carneghan v. Brewster*, 2 Barr 41.

<sup>2</sup> *Cowden's Estate*, 1 Barr 267.

<sup>3</sup> Sect. 1, *Purd. Dig.* 747, pl. 1, 8 Sm. Laws 189.

<sup>4</sup> Sect. 8, *Purd. Dig.* 750, pl. 21, 8 Sm. Laws 192.

<sup>5</sup> *Pennock v. Hoover*, 5 Rawle 291.

<sup>6</sup> *Northern Liberties v. St. John's Church*, 1 Harris 104.

<sup>7</sup> *Pray v. Northern Liberties*, 7 Casey 69.

<sup>8</sup> *Northern Liberties v. Swain*, 1 Harris 113.

<sup>9</sup> *Parker's Appeal*, 8 W. & S. 449.

<sup>10</sup> *Purd. Dig.* 955, pl. 153, *Pamph. L.* 495.

<sup>11</sup> *Parker's Appeal*, 8 W. & S. 449.

for the current year are a lien from the date of their assessment, for the Act of 1858<sup>1</sup> has not altered the Act of 1824 in this respect.<sup>2</sup> The object of the latter act was to restore the registry of taxes which had been dispensed with by the Consolidation Act,<sup>3</sup> and it may be questioned whether a tax is a lien after the expiration of the year in which it was assessed, unless it is registered.<sup>4</sup>

A relinquishment by a collector of taxes of a distress on the goods of a tenant of the real estate is not a release of the priority of the tax-lien in favor of other lien-creditors; but if the distress had been upon the goods of the owner of the property, *quære*, whether it would not have entirely discharged the lien for taxes.<sup>5</sup> Under the Act of 1844<sup>6</sup> taxes assessed on real estate are not payable out of the proceeds of an execution levied on the chattels of the owner of the land.<sup>7</sup> The provisions of the Act of 1824 do not apply to state taxes assessed under the Act of 11th June 1840.<sup>8</sup>

In Philadelphia, registered taxes, whether claims have been filed or not, are not divested by a judicial sale, the proceeds of which are insufficient to discharge and pay them.<sup>9</sup>

By the Act of 1846,<sup>10</sup> in all the sections in which the subject is referred to, unpaid taxes, whether registered only or registered and filed, are denominated "claims" for taxes, and the expression "such claims" in the 6th section (which provides that the "lien of such claims" shall not be divested by any judicial sale, as respects so much thereof as the proceeds thereof may be insufficient to discharge), is to be construed in its general or popular sense.<sup>11</sup>

A municipal lien for grading and paving, filed by the city of Pittsburgh in 1857, under the act of that year, is not to be preferred to a mortgage entered in 1848, and the acts prior to 1857 did not authorize a lien for paving side-walks in Pittsburgh.<sup>12</sup>

*Wages* of mechanics and laborers are by numerous acts constituted a lien upon the real and personal property of certain classes of employers, in certain counties of the State. The cases in which such lien exists, its amount and duration, and the counties to which these provisions are applicable, have been already exhibited.<sup>13</sup>

Under the Act of 2d April 1849,<sup>14</sup> the wages of miners, laborers, and mechanics are not entitled to a preference in the distribution of the proceeds of real estate, over liens of record.<sup>15</sup>

*Mechanics' liens* have priority from the date of the commencement

<sup>1</sup> Act 21st April 1858, § 2, *Purd. Dig.* 947, pl. 109, *Pamph. L.* 385.

<sup>2</sup> *Camac v. Beatty*, D. C. Phila., 20 *Leg. Int.* 21.

<sup>3</sup> Act 2d February 1854, § 11, *Pamph. L.* 29.

<sup>4</sup> *Camac v. Beatty*, *ubi supra*, per *SHARSWOOD*, P. J.

<sup>5</sup> *Parker's Appeal*, 8 W. & S. 449.

<sup>6</sup> Act 29th April 1844, § 42, *Purd. Dig.* 954, pl. 145.

<sup>7</sup> *Parker's Appeal*, 5 Barr 390.

<sup>8</sup> *Parker's Appeal*, 8 W. & S. 449.

<sup>9</sup> *Duffy v. Philadelphia*, 6 *Wright* 192.

<sup>10</sup> Act 11th March 1846, *Pamph. L.* 114.

<sup>11</sup> *Duffy v. City of Philadelphia*, 6 *Wright* 197, per *THOMPSON*, J.

<sup>12</sup> *Appeal of City of Pittsburgh*, 4 *Wright* 455.

<sup>13</sup> See *ante*, 926 *et seq.*

<sup>14</sup> *Purd. Dig.* 1006, pl. 1-3, *Pamph. L.* 337.

<sup>15</sup> *Wade's Appeal*, 5 *Casey* 323; *Johnston's Estate*, 9 *Casey* 511.

of the building, over judgments and other encumbrances intervening prior to the filing of the claim.<sup>1</sup>

But where a vendee under articles had possession and commenced building, and then received a conveyance of the legal title, and the same day gave a mortgage or judgment for the purchase-money, the purchase-money is to be paid before the liens of mechanics against the building.<sup>2</sup> But it is otherwise where an owner sells an unfinished building and takes a mortgage for the purchase-money: in this case the mechanics' liens are preferred to the mortgage.<sup>3</sup>

A mechanic's lien is postponed to a widow's claim under the Act of 1851.<sup>4</sup>

*Other preferred claims. Sheriff's costs.*—Where there are several liens against the land, and the sale is made under a junior lien, the sheriff's costs are to be paid out of the proceeds, though these are not sufficient to discharge the prior liens.<sup>5</sup> In cases of judicial sales made since April 1st 1863, the stamp duties upon the deed are to be taxed with the costs and paid out of the proceeds.<sup>6</sup>

*Decedent's debts, &c.*—Debts of a testator, and legacies charged on his lands, which are either certain in amount or capable of being rendered certain, are first payable out of the proceeds of a sheriff's sale of his real estate: legacies, the amounts of which are not ascertainable at the date of the sale, and annuities charged on the land, remain a charge on the land in the hands of the purchasers in the inverse order of the dates of the encumbrances under which the lands were sold.<sup>7</sup>

*Heirs in partition.*—Where the land is sold under a judgment against the cognisor, the heirs whose shares were secured by the recognisance, and the administrators of the widow, who had died between the levy and sale, were held to be entitled to the portion of the valuation due at her death, in preference to the plaintiff in a judgment against the cognisor posterior in date to the recognisance.<sup>8</sup>

*Arrears of ground-rent* due at the date of the sale are discharged thereby, as has been seen, and are payable out of the proceeds;<sup>9</sup> and are preferred to a judgment of a stranger, though such judgment existed before the rent became due,<sup>10</sup> and though the sale was made under such judgment,<sup>11</sup> and though during the whole time the rent was accruing there was property on the premises which might have been distrained.<sup>12</sup> But interest on such arrears will not be allowed.<sup>13</sup> But arrears accruing after the date of the sheriff's sale cannot be paid out of the proceeds; for these the purchaser must be resorted

<sup>1</sup> Act 16th June 1836, § 10, *Purd.* Dig. 710, pl. 11, *Pamph.* L. 698.

<sup>2</sup> *Campbell's Appeal*, 12 *Casey* 247; *Stoner v. Neff*, 14 *Wright* 258.

<sup>3</sup> *Ins. Co. v. Pringle*, 2 S. & R. 138.

<sup>4</sup> *Hildebrand's Appeal*, 3 *Wright* 133. See *ante*, 822.

<sup>5</sup> *Shelly's Appeal*, 2 *Wright* 210.

<sup>6</sup> Act 15th April 1863, § 2, *Pamph.* L. 477.

<sup>7</sup> *Cowden's Estate*, 1 *Barr* 267.

<sup>8</sup> *Riddle's Appeal*, 1 *Wright* 177.

<sup>9</sup> See *Bantleon v. Smith*, 2 *Binn.* 146; *Sands v. Smith*, 3 *W. & S.* 12; *Pancoast's Appeal*, 8 *W. & S.* 381; *Creigh v. Shatto*, 9 *W. & S.* 84; *Western Bank v. Willitts*, 2 *P. L. J.* 45.

<sup>10</sup> *Ter Hoven v. Kerns*, 2 *Barr* 96; *Fassitt v. Middleton*, D. C. Phila., 20 *Leg. Int.* 357.

<sup>11</sup> *Pancoast's Appeal*, 8 *W. & S.* 381.

<sup>12</sup> *Dougherty's Estate*, 9 *W. & S.* 189.

<sup>13</sup> *Ibid.*; *Ter Hoven v. Kerns*, 2 *Barr* 96.



to, although, owing to a motion to set aside the sale, he may not have received his deed for a long time afterwards.<sup>1</sup>

And where the bail for stay of execution upon a judgment for arrears of ground-rent paid off a judgment obtained against him on his recognisance, and had the original judgment against his principal marked to his use, neither he nor his assignee will have any priority over a subsequent judgment against the principal for additional arrears: unless there was an agreement on the part of the plaintiff to guaranty the assigned judgment, or a stipulation to postpone the later judgment.<sup>2</sup>

The payment of interest upon arrears of ground-rent will be decreed as against the ground-tenant or his residuary legatee, wherever it has been unjustly and inequitably withheld.<sup>3</sup>

*Purchase-money.*—A mortgage given for the purchase-money of the mortgaged premises takes priority from the date of its execution, though not recorded till after the entry of a judgment against the vendee, provided it be recorded within sixty days from its execution.<sup>4</sup> So where the mortgage for purchase-money was executed before, but not recorded till after, the entry of a judgment, it has priority where the judgment-creditor had actual knowledge of the mortgage before the debts were contracted on which the judgment was founded.<sup>5</sup> A statement in a mortgage that it was given for purchase-money may be disproved by a conflicting creditor.<sup>6</sup>

A judgment for purchase-money, entered on the same day as the execution of the conveyance of the legal title, has priority over a judgment obtained against the vendee after the purchase but before the execution of the conveyance:<sup>7</sup> but the priority would be the other way if the judgment for purchase-money had been entered some days after the execution of the conveyance.<sup>8</sup> And in such case the judgment for purchase-money has priority over a mechanic's lien.<sup>9</sup> But where the sale is under a judgment in favor of vendor against vendee, for the purchase-money, the vendor's whole interest passes, and he is entitled to the proceeds, to the whole extent of the unpaid purchase-money, without regard to the date of his judgment, in preference to liens on the vendee's title.<sup>10</sup> And where the vendee purchased subject to encumbrances expressly charged in the deed, the amount of such encumbrances is not to be deducted from the unpaid purchase-money.<sup>11</sup> And a parol agreement may be shown between vendor and vendee, that the latter should take subject to encumbrances not named in the deed.<sup>12</sup>

<sup>1</sup> *Walton v. West*, 4 Whart. 221.

<sup>2</sup> *Fassitt v. Middleton*, 11 Wright 214.

<sup>3</sup> *Chew's Estate*, O. C. Phila., 4 Phila. Rep. 186.

<sup>4</sup> Act 28th March 1820, § 1, *Purd. Dig.* 324, pl. 94, 7 Sm. Laws 303.

<sup>5</sup> *Britton's Appeal*, 9 Wright 172. And see the opinion of the court for a discussion of the effect of actual notice of an unrecorded mortgage. See also an adverse criticism upon *Britton's Appeal*, 20 Leg. Int. 293.

<sup>6</sup> *Hendrickson's Appeal*, 12 Harris 363.

<sup>7</sup> *Cake's Appeal*, 11 Harris 186.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Stoner v. Neff*, 14 Wright 258.

<sup>10</sup> *Horbach v. Riley*, 7 Barr 81; *Vierheller's Appeal*, 12 Harris 105. If the sale were made under a judgment against the vendee, it is subject to the vendor's claim, and he is not entitled to the proceeds: *Ibid.* But see *Cake's Appeal*, *supra*.

<sup>11</sup> *Buckley's Appeal*, 12 Wright 491.

<sup>12</sup> *Ibid.*

A judgment confessed on promissory notes, which were given in payment of a personal debt by the assignee of the vendee's interest, and were transferred by the vendee to the vendor in payment of the purchase-money of the land, has no connection with a mortgage for an instalment of the purchase-money given to the vendor by the vendee's assignee: such judgment is not for purchase-money, since the acceptance of the notes discharged that debt by merging the original liability.<sup>1</sup>

Where it is clearly manifest in the conveyance, though not expressly declared, that the purchase-money is to remain a lien on the land, the court will give the vendor priority over a mortgagee of the vendee.<sup>2</sup> But in all other cases the vendor's lien for purchase-money is determined by his conveyance of the legal title, unless continued by judgment or mortgage.<sup>3</sup>

The lien of purchase-money is so much favored that, though a judgment confessed or mortgage given by a married woman is absolutely void, yet if the debt be for purchase-money, the court will allow an execution restricted to the land to issue on such judgment, and will allow such mortgage to be enforced in equity.<sup>4</sup>

*Other exceptions* occur to the general rule, that liens entitled to the proceeds are to be paid in the order of their dates. A judgment intervening between a mortgage and a judgment on a note secured by the mortgage, gains no priority over the mortgage by reason of its priority over the judgment.<sup>5</sup> So, where the land was sold under a judgment for arrears of interest due on a mortgage, the mortgage being discharged by the sale, the mortgagee is entitled to the proceeds in preference to judgment-creditors, whose liens are posterior to the mortgage, though prior to the judgment for interest.<sup>6</sup>

Where trustees, under a testamentary power to sell for the payment of unscheduled debts, had conveyed to the devisee for life, who afterwards mortgaged the land, the mortgagee has priority, in distribution of the proceeds of a sheriff's sale under the mortgage, over creditors of the testator who have obtained judgment within five years of his death.<sup>7</sup>

Where the mortgagor conveyed to one who had agreed to assume the mortgage-debt, but failed to pay the interest, and the mortgagor paid it, and subsequently purchased the bond and mortgage, taking an assignment in the name of a trustee, the mortgagor was entitled to receive the principal and interest out of the proceeds of a sheriff's sale of the land under a judgment against his vendee, in preference to judgment-creditors of the vendee.<sup>8</sup> A judgment obtained after defendant had been duly declared an habitual drunkard, on a sheriff's sale of the land under prior liens, was postponed, and the fund

<sup>1</sup> Bratton's Appeal, 8 Barr 164.

<sup>2</sup> Neas's Appeal, 7 Casey 293.

<sup>3</sup> Stephens's Executor's Appeal, 2 Wright 9.

<sup>4</sup> Ramborger's Administrator v. Ingraham, 2 Wright 146; Glass v. War-

wick, 4 Wright 140.

<sup>5</sup> Larimer's Appeal, 10 Harris 41.

<sup>6</sup> Bank v. Chester, 1 Jones 282.

<sup>7</sup> Cadbury v. Duval, 10 Barr 265.

<sup>8</sup> Morris v. Oakford, 1 Am. L. J. 473.

awarded to the committee of the estate until the inquisition should be set aside, or the competency of the defendant restored.<sup>1</sup>

Where a judgment against two co-debtors was entered on the same day with a judgment by one of them against the other, and the land of the latter was sold under the judgment against both, the one having the judgment could not claim to be paid out of the proceeds, as against the creditor at whose suit the sale was made—though the two liens were of the same date, the equity of the creditor was superior to that of the debtor.<sup>2</sup>

The lien of a judgment is not postponed to that of a subsequent one, by the plaintiff in the former having become defendant's bail for stay of execution in the latter.<sup>3</sup> Nor does the guaranty, by a mortgagee, of a subsequent judgment, give the judgment any preference over the mortgage in the hands of an assignee, though the guaranty is prior in date to the assignment.<sup>4</sup>

And even if a promise be valid, which was made by a lien-creditor purchasing at the sheriff's sale, to pay a subsequent judgment if the plaintiff therein or his attorney would cease bidding, yet the remedy is by action only, and the auditor distributing the proceeds cannot, on that ground, disregard the prior lien of the purchaser.<sup>5</sup> It has since been held that such promises are void, and cannot be enforced by suit.<sup>6</sup>

Where the last of three liens became superior to the first, though still remaining inferior to the second, it gained no practical advantage from its priority, because it could not be preferred to the first without being preferred also to the second, to which it is subsequent.<sup>7</sup> So a waiver of the Exemption Law in favor of junior judgment-creditors gives them no preference in the distribution over prior judgment-creditors in whose favor there was no such waiver.<sup>8</sup>

A prior judgment-creditor may waive his priority in favor of a subsequent one without extinguishing his judgment, which may be satisfied out of any lands bound by it; and if the subsequent judgment-creditor becomes the assignee of the first judgments, he succeeds to all the rights of the assignor.<sup>9</sup>

In a clear case, and where it is necessary to prevent manifest injustice, the lien of a judgment may be restrained, and parol proof is admissible as to the terms upon which it is confessed.<sup>10</sup> And persons claiming that a judgment was confessed in trust for their benefit, must take subject to the arrangement under which it was confessed.<sup>11</sup>

*Partnership judgments* are to be paid out of the proceeds of partnership lands, in preference to prior judgments against indivi-

<sup>1</sup> Paul v. Divine, D. C. Phila., 4 Phila. Rep. 21.

<sup>2</sup> Vierheller's Appeal, 12 Harris 105.

<sup>3</sup> Gardner's Appeal, 7 W. & S. 295.

<sup>4</sup> Moore's Appeal, 7 W. & S. 298.

<sup>5</sup> Logue's Appeal, 10 Harris 50.

<sup>6</sup> Slingluff v. Eckel, 12 Harris 472.

<sup>7</sup> Wilcocks v. Waln, 10 S. & R. 380;

Manuf. & Mech. Bank v. Bank of Pa., 7 W. & S. 337, as explained in Tombs's Appeal, 9 Barr 67, per GIBSON, C. J.

<sup>8</sup> Lauck's Appeal, 8 Wright 395.

<sup>9</sup> Bank of Pa. v. Winger, 1 Rawle 295.

<sup>10</sup> Claason's Appeal, 10 Harris 359.

<sup>11</sup> Ibid.

dual members of the partnership.<sup>1</sup> And if the judgment is merely joint, the plaintiff may show on the distribution that the cause of action was a partnership debt.<sup>2</sup> But a judgment entered on the *judgment-docket* against the members of a firm by their surnames, omitting their Christian names, though valid between the parties, is not such notice as will bind purchasers or subsequent judgment-creditors, and will be postponed to a subsequent judgment properly entered: and it makes no difference that the judgment in question had been properly entered in the *appearance-docket*.<sup>3</sup>

A judgment against a partnership is a lien on the separate real estate of each partner, and is entitled to the proceeds in preference to a subsequent judgment by a separate creditor of such partner.<sup>4</sup> A judgment confessed without authority by one partner in the name of the firm, though void as to his copartners, is good as between himself and his creditor, and is a lien upon his land.<sup>5</sup> The fact that land, conveyed to two persons as tenants in common, was purchased and paid for by them as partners, and was partnership property, must appear by deed or writing placed on record, and cannot be shown by parol proof.<sup>6</sup>

Where land was purchased by one of the partners, who gave his individual bonds and mortgages therefor, the vendors are not entitled to share in the proceeds of partnership assets, though it is shown that the purchase was on firm account.<sup>7</sup>

#### 4. *Disposition of the surplus.*

When the proceeds amount to more than sufficient to satisfy the liens, the officer making the sale or receiving the proceeds must pay the surplus to the debtor, unless the fund has been paid into court, and then, and not before, such officer is discharged of record.<sup>8</sup> By the word *debtor* seems to be meant, persons deriving title from the defendant, such as assignees, grantees, or personal representatives. If the land were sold after the death of the defendant on a judgment obtained against him in his lifetime, the surplus remaining after paying the liens of record must be paid to the personal representatives, on their giving security for the legal distribution of the fund; such money to be distributed as real estate.<sup>9</sup> By liens of record in this section are meant liens existing prior to the death of defendant: the debts due at his death though liens upon his land are not liens of record, and even if judgments are obtained after his death, they have no claim against the surplus of the fund in court, but must be paid through the personal representatives, to whom such surplus must be awarded.<sup>10</sup> If the land sold under such a judgment

<sup>1</sup> Overholt's Appeal, 2 Jones 222; Appeal, 9 Wright 181.

Ridgway's Appeal, 3 Harris 177; Erwin's Appeal, 3 Wright 535.

<sup>2</sup> Overholt's Appeal, 2 Jones 222.

<sup>3</sup> Ridgway's Appeal, 3 Harris 177.

<sup>4</sup> Cumming's Appeal, 1 Casey 268.

<sup>5</sup> The York Bank's Appeal, 12 Casey 458.

<sup>6</sup> Ridgway's Appeal, 3 Harris 177.

<sup>7</sup> Northern Pennsylvania Coal Co.'s

Act 16th June 1836, § 93, Purd. Dig. 447, pl. 112, Pamph. L. 778.

<sup>8</sup> Act 24th February 1834, § 33, Purd. Dig. 288, pl. 99, Pamph. L. 79. See Morrison's Case, 9 W. & S. 116; Willing v. Yohe, D. C. Phila., 1 Phila. Rep. 223.

<sup>10</sup> Willing v. Yohe, D. C. Phila., 1 Phila. Rep. 223.

had been taken by an heir at a valuation, and a recognisance given, the cognisee is entitled to the surplus paid to the administrator.<sup>1</sup>

Where a life-tenant had joined with the remainder-men in a mortgage of the land for the proper debt of the latter, and the land was sold under a judgment on the mortgage, the life-tenant was allowed to take the surplus as against judgment-creditors of those in remainder, on giving security for the payment of the principal sum after her death.<sup>2</sup> So where, under a joint judgment against two, the land of one is sold, the surplus after payment of the joint liens goes to the owner of the land in exclusion of his joint defendant and the creditors of the latter.<sup>3</sup>

If after articles of agreement for the sale of land the premises are sold under judgments against the vendor entered prior to the date of the articles, and the proceeds are greater than the contract price of the land, the vendee is entitled to the difference in preference to a judgment-creditor of the vendor whose lien attached after the date of the articles.<sup>4</sup> And it makes no difference that the vendee was the purchaser at the sheriff's sale, or that he procured the sheriff's sale to be made by obtaining an assignment of the judgment for value, and issuing the execution.<sup>5</sup>

Where, after a conveyance of land subject to certain judgments, it is sold by the sheriff under several writs issued on those judgments, and on others which did not attach against the vendor till after the conveyance, the vendee who purchased at the sheriff's sale is entitled to the surplus remaining after payment of the judgments entered before the conveyance, in preference to the plaintiffs in the judgments entered after the conveyance.<sup>6</sup>

The taking of the surplus from the sheriff, being the proceeds of land of one who was *sui juris* at the time of the receipt, estops the receiver from denying that he was a party to the action which resulted in the sale.<sup>7</sup>

*Practice before auditors.*—Having explained the principles which govern the distribution, we now proceed to show the mode of hearing and determining the claims to a participation in the fund. The 86th section of the Act of 16th June 1836,<sup>8</sup> provides that in all cases of disputes concerning the distribution of the proceeds of sales upon execution, the court from which the execution issued shall have power after reasonable notice given, either personally or by advertisement, to hear and determine the same, according to law and equity. In the case of a *testatum* execution the court of the county where the sale is made may distribute the fund, if the proceeds have been paid into such court, in the same manner as if the process had issued from such court.<sup>9</sup> And in the case of a sale of

<sup>1</sup> Commonwealth v. McIntyre, 8 Barr 295; s. c., 1 Am. L. J. 87.

<sup>2</sup> Bloomfield v. Budden, 2 Dallas 183; s. c., 1 Yeates 187; Mollison v. Bowman, 5 Pittsburgh L. J. 181.

<sup>3</sup> Myers's Appeal, 2 Barr 465, per Rogers, J.

<sup>4</sup> Siter's Appeal, 2 Casey 178;

Crouse's Appeal, 4 Casey 139.

<sup>5</sup> Crouse's Appeal, 4 Casey 139.

<sup>6</sup> Bitting's Appeal, 5 Harris 211.

<sup>7</sup> Wilkins v. Anderson, 1 Jones 399.

<sup>8</sup> Purd. Dig. 446, pl. 103, Pamph. L. 777.

<sup>9</sup> Act 16th June 1836, §. 100, Purd. Dig. 448, pl. 120, Pamph. L. 779.

lands lying partly in different counties, the court issuing the writ has power to distribute the fund with respect to liens upon the portion of the tract lying in the adjoining county or counties:<sup>1</sup> and where separate sales have been made in several counties, of the defendant's lands therein, and it is claimed that one or more of the liens binds the whole, the Common Pleas of the county where the first sale was made, or, in case a special court is necessary, then the president judge of any adjoining district, may distribute the whole fund.<sup>2</sup>

*Appointment of auditors.*—The courts rarely in the first instance exercise this power of distribution, but where there are conflicting claims to the fund, the questions in dispute are on motion of one of the claimants referred for examination to an officer of the court, appointed *pro hac vice*, who is called an auditor. Auditors are called in by the court to hear matters of detail which the court has not time to hear, and to inform the conscience of the courts as to facts which are essential to be known before a particular decree or judgment can be pronounced.<sup>3</sup> The usual purposes for which an auditor is appointed, are to state an account, to report facts, and to report facts with his opinion thereon;<sup>4</sup> but there are numerous other cases in which a court of record may appoint an auditor, though, as these are foreign to our subject, we merely refer to the authorities.<sup>5</sup> The purpose for which an auditor is appointed should be distinctly stated in the order of reference.<sup>6</sup>

Usually a single auditor is appointed, but in very difficult cases there may be three. Auditors should be members of the bar; and in the District Court of Philadelphia must be of at least two years' standing.<sup>7</sup> No person can be appointed an auditor who is related by ties of consanguinity or marriage to any judge of the court:<sup>8</sup> but, except in Allegheny county, this does not apply to cases where the parties interested or their counsel nominate the auditor.<sup>9</sup> The Common Pleas of Philadelphia will not regard an agreement appointing an auditor by consent, unless accompanied by an affidavit that the parties or counsel signing such agreement represent all the parties in interest.<sup>10</sup>

On being notified of his appointment the auditor obtains from the prothonotary a certificate of that fact, and, after ascertaining that the fund has been paid into court, proceeds to give public notice of the time and place of meeting the parties by advertisement in the manner prescribed by the rules of court,—in Philadelphia twice successively in the *Legal Intelligencer*, and also in a daily newspaper of the city, in the District Court for ten successive days

<sup>1</sup> Act 13th June 1840, § 12. *Purd.* Harris 422.  
Dig. 444, pl. 87, Pamph. L. 692.

<sup>2</sup> Act 13th April 1843, § 9, *Purd.* Dig. 445, pl. 90, Pamph. L. 235.

<sup>3</sup> *Miller's Appeal*, 6 Casey 490, per Woodward, J.

<sup>4</sup> *Mengas's Appeal*, 7 Harris 221, per Lowrie, J.

<sup>5</sup> See *Purd.* Dig. 77, n. a. tit. "Auditors." See also *Kintera's Estate*, 5

<sup>6</sup> *Mengas's Appeal*, 7 Harris 221.

<sup>7</sup> Rules D. C. XIII., Walker's Rules 10.

<sup>8</sup> Act 24th January 1849, *Purd.* Dig. 77, pl. 1, Pamph. L. 682.

<sup>9</sup> Act 29th March 1860, *Purd.* Dig. 77, pl. 2, Pamph. L. 343.

<sup>10</sup> Rules C. P. VIII., § 6, Walker's Rules 47.

(Sundays excepted), in the Common Pleas and Orphans' Court for five alternate days, and also puts up in the prothonotary's office a written or printed notice of the time and place of hearing at least six days before the hearing. In the advertisements and notice, all persons are required to present their claims to the auditor or be debarred from coming in on the fund. It is customary also before the meeting, for the auditor to procure from the prothonotary the writ or writs under which the sheriff's sale was made, and to cause searches for encumbrances to be made in the different offices.

At the time and place appointed for the hearing the parties appear before the auditor and present their claims, which he then proceeds to examine. And all parties having claims upon the fund should present them before the auditor, though it is not too late to present a claim after his report has been filed, and referred back to him for amendment:<sup>1</sup> but after decree of distribution has been made it is too late, as all claimants are barred by such decree.<sup>2</sup> The lien-creditors must look to the application of the fund at their peril, everything which a due attention to their interest would have entitled them to receive, being, as regards the debtor, considered as paid.<sup>3</sup>

*Powers of the auditor at the hearing.*—As regards the auditor's authority, the commission issued by the prothonotary controls the docket entry of his appointment.<sup>4</sup> An auditor duly appointed is empowered to issue *subpœnas* to witnesses to appear before him: and if the person subpoenaed refuses or neglects to attend, the auditor, or, where there are more than one, the majority of the auditors, may issue an attachment against such person according to the practice of the courts, directed to the sheriff or any constable of the proper county for execution.<sup>5</sup> He is empowered to administer an oath or affirmation to witnesses; and if a witness refuses to testify, the court which appointed the auditor will grant a rule to show cause why an attachment should not issue against him, and if the reasons for his refusal are insufficient, will issue the attachment.<sup>6</sup> He should reduce the testimony to writing.

The defendant in the execution may be examined as a witness, to ascertain facts in reference to the distribution, where his interest is equally balanced.<sup>7</sup> Thus he is competent to prove on the part of a junior lien-creditor that a prior lien has been paid in part:<sup>8</sup> the proceeding before the auditor is between lien-creditors, and is an estoppel only as to them; the debtor is not by such testimony discharging himself from any liability.<sup>9</sup>

So an executor, administrator, or guardian, may be examined before the auditor to whom his account is referred; but it must be at the instance of an opposing party; he cannot give evidence at his

<sup>1</sup> Ross's Estate, 9 Barr 17.

<sup>2</sup> Finney's Appeal, 3 Barr 312.

<sup>3</sup> Finney's Administrators v. Commonwealth, 1 Pa. R. 240; Bank of Pa. v. Winger, 1 Rawle 295.

<sup>4</sup> Yoder's Appeal, 9 Wright 394.

<sup>5</sup> Act 11th April 1848, § 4, Purd. Dig. 77, pl. 3, Pamph. L. 507.

<sup>6</sup> Matthew's Estate, O. C. Phila., 1 Phila. Rep. 292.

<sup>7</sup> See Stewart v. Stocker, 1 Watts 135; Guillou v. Healy, D. C. Phila., 1 Phila. Rep. 335.

<sup>8</sup> Galway's Appeal, 10 Casey 242.

<sup>9</sup> Ibid.

own instance and in his own behalf.<sup>1</sup> It was error to refuse to hear a witness on the ground that the testimony sought to be given went to contradict other witnesses, who had been called by the party for the same purpose, but whose statements went to controvert the facts sought to be proved: it is an erroneous though prevalent opinion, that a party cannot contradict his own witness by calling another to give a different and perhaps diametrically opposite account of the same transaction: parties may call any reasonable number of witnesses without regard to how far their recollections may differ and be in conflict.<sup>2</sup> It is not error to receive parol evidence to explain an assignment in writing which purports to have been made "for value received," by showing what was the consideration upon which it was executed.<sup>3</sup>

In admitting or rejecting testimony the auditor is to be governed by the ordinary rules of evidence, and his decision is subject to review by the court upon exceptions taken by a dissatisfied party. When evidence is offered and objected to, and he is desired by a party to note it for the opinion of the court, he should distinctly state in his report the offer and its purpose, and the objection thereto, and his ruling thereon: in some cases he can also state how the report should be in case the evidence has been erroneously admitted or reported by him: and it may be very proper in some cases to report the question of evidence to the court for decision, and suspend the proceedings until it is decided.<sup>4</sup>

*Jurisdiction.*—On the distribution no question can be raised concerning the regularity of the proceeding under which the fund was brought into court: thus it will be presumed that the defendant had notice of the inquisition.<sup>5</sup> Nor can the validity of the judgment, under which the fund was derived, be in any way contested.<sup>6</sup> So in proceedings in distribution of proceeds of a sheriff's sale of land, the question whether a former sale of the same land, on a judgment against the same defendant, was fraudulent, cannot be raised.<sup>7</sup> Where the sheriff sold personal property under several executions, and paid the money into court without discrimination of the amounts, the auditor would in strictness have been justified in declining to take jurisdiction of it and refusing to distribute the fund; but if both parties appeared and the auditor made distribution, exceptions will not be sustained on this ground.<sup>8</sup> When appointed to distribute money made on a specified writ, an auditor cannot include in his report other money not so derived.<sup>9</sup>

An adjudication by an auditor is, like that of a court of common law, conclusive only of those matters which must be presumed to have been adjudged because they were brought forward for adjudication, and all others remain open so far as the right is concerned,

<sup>1</sup> Mylin's Estate, 7 Watts 64.

<sup>2</sup> White v. Lucas, D. C. Phila., 17 Leg. Int. 52; s. c., 4 Phila. Rep. 30.

<sup>3</sup> Galway's Appeal, 10 Casey 242.

<sup>4</sup> Mengas's Appeal, 7 Harris 221. See Haines v. Barr, D. C. Phila., 7 Leg. Int. 521. But see Woelper's Appeal, 2 Barr 71; Rossiter's Appeal, Ibid. 371.

<sup>5</sup> Brant's Appeal, 8 Harris 141.

<sup>6</sup> Housekeeper's Appeal, 13 Wright 141.

<sup>7</sup> Beekman's Appeal, 2 Wright 385.

<sup>8</sup> Flanagan v. McAfee, D. C. Phila., 1 Phila. Rep. 75.

<sup>9</sup> Benson's Appeal, 12 Wright 159.



although the remedy may in some cases be gone.<sup>1</sup> The auditor has not unlimited jurisdiction in regard to the validity of liens on the fund. It is clear that he may, on motion of a subsequent encumbrancer, adjudicate upon the validity of a prior mechanic's claim ;<sup>2</sup> and he is not obliged to regard as *conclusive* a judgment confessed on such claim ;<sup>3</sup> and even after a judgment in *scire facias* on a mechanic's lien, the regularity and validity of the lien may be examined into by the auditor when the question arises between strangers to the judgment.<sup>4</sup> So a judgment may have been given merely as a

<sup>1</sup> Cowan v. Gonder, D. C. Phila., 19 Leg. Int. 54, citing and explaining Sergeant v. Ewing, 6 Casey 75 ; s. c., 12 Ibid. 156.

<sup>2</sup> Knabb's Appeal, 10 Barr 186 ; Thomas v. James, 7 W. & S. 381.

<sup>3</sup> Field v. Oberteuffer, D. C. Phila., 2 Phila. Rep. 271.

<sup>4</sup> Cadwalader v. Montgomery, D. C. Phila., September 11th 1852. Exceptions to auditor's report. *Per curiam*. Upon a rule to set aside the *levari facias* in this case and let a *terre-tenant* into defence, the opinion of the court was fully expressed upon the validity of this mortgage, and upon the sufficiency of the record of it to make it available against lien-creditors and others. As other parties now appear who did not take part then, we have heard these questions argued at length, and with ability ; but it has not resulted in producing any change in our opinion.

As this disposes of the whole case, it is unnecessary to examine the other questions discussed as to the validity of the liens and the demand of an issue thereon. As, however, one point—the right of the auditor, where there has been a judgment on a *scire facias* on a mechanic's lien, to inquire and decide as to the regularity and validity of the lien when the question arises between parties other than those who were parties and privies to the judgment—is one of considerable frequency and importance in practice, we think it proper to add that we are against the exceptants also on that point.

A judgment may be attacked collaterally before an auditor for fraud or collusion, and if an issue is demanded, he is bound to report such issue ; but if no issue is demanded, he may decide that it is fraudulent as to the party impeaching, and exclude it from the distribution, or postpone it.

It is not competent, however, for any third person to attack a judgment on the ground of error or irregularity, which can only be taken advantage of

by a party or privy on writ of error.

Where, however, a creditor has a lien prior to the date of the judgment, and it is claimed that the judgment takes priority of him, because rendered upon a debt which was a lien prior to the judgment, there it is competent to the creditor holding a lien prior to the date of the judgment, to dispute the validity of the prior lien.

A simple case will illustrate this position. A judgment has lost its lien by the lapse of five years, then another lien is entered, and afterwards upon a *scire facias* to revive the first judgment, a judgment of revival is entered. The intervening judgment creditor, purchaser, or mortgagee may undoubtedly show that the lien of the revived judgment was gone, notwithstanding the judgment of revivor.

It does not appear in Lauman's Appeal, 8 Barr 473, whether judgments upon the liens were obtained prior or subsequent to the entry of the judgments which are called in the report *subsequent*. If they were subsequent, the decision in that case is entirely consistent with the opinion here expressed.

We cannot think that the Supreme Court meant to decide that if a mechanic's claim was not a valid lien from the want of compliance with the requisites of the Act of Assembly, if it was uncertain as to description, failed in specifying the date, character, and amount of the claim, if it had not been filed in time ; these defects could all be cured as against an intervening creditor, mortgagee, or purchaser, by a judgment of which he had no notice, and to which he was no party.

There may be reason for holding, and that is all we can suppose the Supreme Court meant to decide, that a man who lends or pays his money after the judgment, takes subject to the lien of the judgment, *qua* judgment, which may have, with great appearance of justice, the effect given to it of a general judgment, though its lien may from the na-

security for future advances, or confessed without consideration and in fraud of other judgment-creditors; or a judgment may have really been paid and satisfied, but kept on foot in fraud of other creditors. In these and like cases the creditors of the defendant may attack the judgment collaterally before the auditor for fraud or collusion;<sup>1</sup> and this whether it is a judgment of the same or of another court.<sup>2</sup> But they cannot take any direct matter of defence, whether original or subsequent, to a judgment;<sup>3</sup> nor can they raise before the auditor any question of error or irregularity in the judgment, or in the issuing of execution.<sup>4</sup> The defendant only, or his representatives, can object to the judgment on the ground of error or irregularity, and that not collaterally before the auditor, but by writ of error or application to the court where it was rendered; though it is said the auditor may adjourn the audit, to enable a party to apply to the court to open the judgment, or he may take testimony to show payment since its rendition.<sup>5</sup> And where a creditor objects to a prior judgment for failure of consideration, he can only overturn it in a feigned issue directed to ascertain the amount due upon it: if he does not take this course, the judgment stands and cannot be disregarded in the distribution.<sup>6</sup> But the auditor has no power to inquire into the validity of a judgment rendered in court: he cannot set it aside, but must either allow it according to its date, or suspend his decision until its validity is decided by an issue directed by the court.<sup>7</sup> But he may disregard a void judgment.<sup>8</sup>

A mortgage may be impeached for usury, before the auditor, by subsequent judgment-creditors, with a view to divert so much of the fund as exceeds the real debt, after deducting the usurious interest, and appropriating it to the payment of their own judgments:<sup>9</sup> and a junior mortgage-creditor can question the validity of a prior mortgage on the ground of usury:<sup>10</sup> and the usurious mortgagee cannot, even with the assent of his mortgagor, apply partial payments to the unsound part of the mortgage, for the purpose of keeping alive the sound part to the prejudice of a junior mortgagee.<sup>11</sup> So a distinct

ture of its proceedings be merely specific. Thus a judgment on a *scire facias* on an unrecorded mortgage may be a lien from its date *qua* judgment, but surely a party who had advanced his money before upon the faith that there was no record, or that the record was insufficient and void, is not concluded by the subsequent judgment upon the *scire facias* to which he was neither party nor privy. A judgment is conclusive evidence to all the world, that there is such a judgment; a debt of record with a lien. No mere stranger can object that it is erroneous. But beyond its legal effects as a judgment, as evidence that the debt recovered was due ten days or ten years before—that the debt had a particular quality or anything else, though as between the parties this enters into the

very vitality of the judgment, it is not even evidence as against strangers, much less conclusive of their rights. Exceptions dismissed.

<sup>1</sup> *Lewis v. Rogers*, 4 Harris 18; *Woodward v. Schmitt*, D. C. Phila., 20 Leg. Int. 133.

<sup>2</sup> *Woodward v. Schmitt*, *supra*.

<sup>3</sup> *Lewis v. Rogers*, 4 Harris 18.

<sup>4</sup> *Sabbaton's Estate*, 2 Am. L. J. 83, *Lowber's Appeal*, 8 W. & S. 387.

<sup>5</sup> *Dyott's Case*, 2 W. & S. 567. See *Lowber's Appeal*, 8 W. & S. 387.

<sup>6</sup> *Lewis v. Rogers*, 4 Harris 18.

<sup>7</sup> *Leeds v. Bender*, 6 W. & S. 315.

<sup>8</sup> *Brunner's Appeal*, 11 Wright 67.

<sup>9</sup> *Building Association v. O'Connor*, D. C. Phila., 3 Phila. Rep. 453.

<sup>10</sup> *Greene v. Tyler*, S. Ct., 18 Leg Int. 268.

<sup>11</sup> *Ibid*.

allegation of fraud and collusion between the mortgagor and mortgagee, is sufficient ground for the auditor to recommend an issue to try the *bona fides* of the mortgage.<sup>1</sup>

Though, in distributing the proceeds, the court does not investigate alleged frauds in defendant's title, it must examine the title so far as to ascertain what title was sold, and what judgments were liens upon it discharged by the sale.<sup>2</sup> So where land was sold under a judgment against several defendants, the auditor and the court, in distributing the fund, must decide on their respective titles, and whether one is entitled by purchase to the whole, or there is a resulting trust for the others.<sup>3</sup> So in case of personal property, where the sheriff returns that he has sold it, first, under an execution against a single partner, and secondly, under executions against the firm, the auditor is bound to go behind the returns and inquire whether the property belonged to the individual or the firm.<sup>4</sup>

*Report.*—The duty of the auditor is to ascertain the facts in the case and report them to the court, with a schedule indicating the distribution just and proper to be made under the circumstances.

This report must be in writing, and to it he must annex his commission, advertisements, and similar papers. In general it is his duty, when requested, to report all the facts and inferences of facts that are necessary to sustain the conclusion at which he arrives: he should report the facts proved, not the evidence; this part of his report should be in fact a case stated, or a special verdict.<sup>5</sup> In stating an account, he is not obliged to state the facts upon which he finds the several items to be correct, unless he is specifically requested to do so by the party objecting to the item; and no general request as to all or several items should be regarded.<sup>6</sup> Except when appointed to report evidence, he does not perform his duty by returning the testimony taken by him, and the court does not look at the evidence, unless the report is excepted to for some facts specifically alleged to be untrue found by the auditor; but he may, if he chooses, annex his notes of the testimony to his report; and in some courts the practice requires him to return the testimony for the inspection of the court, in case his report of the facts is excepted to.<sup>7</sup> It is very proper for him to aid the court by giving the reasons for his judgment, but when he does so, it is more regular to annex his opinion to his report, than to embody it therein.<sup>8</sup> Auditors ought not to state and discuss the evidence before them: it would be well if they would always commence their report with some such formula as this: "The auditor, from the evidence adduced before him, finds the facts to be as follows."<sup>9</sup> He should annex to his report a schedule of distribution, in which should be stated the name of each party entitled to participate in the fund and the

<sup>1</sup> Goodwin v. Sheppard, C. P. Phila., Phila. Rep. 271.

3 Phila. Rep. 441.

<sup>2</sup> Beekman's Appeal, 2 Wright 385.

<sup>3</sup> Meyer's Appeal, 2 Barr 463.

<sup>4</sup> Vandike's Appeal, 5 Harris 271.

<sup>5</sup> Mengas's Appeal, 7 Harris 221; Leg. Int. 37, per SHARWOOD, P. J.

Field v. Oberteuffer, D. C. Phila., 2

<sup>6</sup> Mengas's Appeal, 7 Harris 221.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Church v. Church, D. C. Phila., 17

amount to which he is entitled. Distribution will be made, not among *cestuis que trust* individually, but to the trustee as their representative.<sup>1</sup>

*Compensation of auditor.*—Auditors are allowed fees for distributing a fund paid into court.<sup>2</sup> The auditor generally fixes the amount of his compensation in the first instance, taking into consideration the number of meetings, the nature and difficulty of the questions submitted to him, and the amount of the fund.<sup>3</sup> The auditor's fee, like any other part of the report, may be excepted to by any dissatisfied party, and after argument will be reduced or confirmed by the court.<sup>4</sup> The courts have always possessed and exercised the power of fixing the compensation of auditors.<sup>5</sup> If the auditor is in doubt as to the proper charge, it is well to consult the counsel who have appeared before him, and save himself the mortification of having his charge contested and perhaps reduced by the court.

The Act of 29th March 1819<sup>6</sup> limited the compensation of auditors to two dollars *per diem*. This provision was repealed by the Act of 2d April 1860.<sup>7</sup> But while in force it did not apply to the case of auditors, whose decision the parties have agreed shall be final and conclusive, and that no exceptions shall be taken thereto.<sup>8</sup> But such agreement does not make the auditors final judges of their own compensation, and if it had done so, it would have been illegal and abortive.<sup>9</sup>

In Berks county the fees of auditors appointed by the Orphans' Court or Common Pleas are limited to one dollar and fifty cents *per diem*, and in no case can an auditor's fee exceed four dollars and fifty cents, without the special order of the court;<sup>10</sup> and in Lebanon county to one dollar *per diem*, and three dollars for making the report, provided that in no case shall the *daily pay* of an auditor exceed five dollars without the special order of the court.<sup>11</sup>

*Costs of audit.*—Auditors' fees come out of the fund,<sup>12</sup> even in the Orphans' Court.<sup>13</sup> And where it was evident that a part of the expenses of the audit was in consequence of the misconduct of the administratrix, yet as it was difficult, if not impracticable, to determine the part thus incurred, the Supreme Court concurred with the auditor and with the Orphans' Court in charging the expenses of the audit against the fund;<sup>14</sup> but if they cannot be obtained from that source the auditor is not to lose them, but the party at whose instance he was appointed must pay them, with the right of recovery against the losing party, as other costs are taxed and collected.<sup>15</sup>

Where the sheriff, in pursuance of the Act of 20th April 1846,

<sup>1</sup> Yarnal's Appeal, 3 Barr 363.

<sup>2</sup> Fitzsimmons's Appeal, 4 Barr 248.

<sup>3</sup> See Porter's Appeals, 6 Casey 500.

<sup>4</sup> Heiney's Estate, O. C. Phila., 4 Phila. Rep. 178.

<sup>5</sup> Porter's Appeals, 6 Casey 496.

<sup>6</sup> 7 Sm. Laws 228.

<sup>7</sup> Pamph. L. 585.

<sup>8</sup> Porter's Appeals, 6 Casey 499.

<sup>9</sup> Ibid. 497.

<sup>10</sup> Act 10th April 1845, § 1, Purd. Dig.

77, pl. 4, Pamph. L. 358.

<sup>11</sup> Ibid., § 3, *ubi supra*.

<sup>12</sup> Fitzsimmons's Appeal, 4 Barr 248.

<sup>13</sup> See Dietterich v. Heft, 5 Barr 90.

<sup>14</sup> Harding's Estate, 12 Harris 189.

<sup>15</sup> Appeal of St. Joseph's Orphan Asylum, 2 Wright 535. This case arose upon the account of an executor who was charged by the auditor with the fees, but who left the state before they were paid.

made a special return in favor of the lien of the purchaser, and exceptions were taken by a creditor to such return, which, on reference to an auditor, were ascertained to be unfounded, it was held that the party excepting ought to pay the costs of the audit, unless he satisfied the court that he had probable cause to object to the return.<sup>1</sup> In another case it is said that the costs of feigned issues, including printer's charges for advertising rules, and the charge of a commissioner for reporting facts, &c., must be apportioned *pro rata* among the creditors.<sup>2</sup> And again it is said that the costs of witnesses' fees, *subpenas*, &c., before the auditor, are in the discretion of the court under the circumstances: as against an undisputed claim no such costs will be allowed; but as against a contesting claim the successful party is entitled to costs out of that part of the fund contended for.<sup>3</sup>

A rule of the Orphans' Court of Philadelphia provides that auditors shall not retain their report as security for their compensation; but when the compensation is allowed by the court they shall be entitled to an attachment for the amount against the party ordered to pay it, if he does not, after notice, pay it within the time prescribed by the court: and any party dissatisfied with the fee charged by the auditor may require him to file his report before payment, in order that the fee may be taxed by the court.<sup>4</sup>

In the other courts the auditor's fee and expenses come out of the fund in most cases, and are not payable till the report is confirmed.

*Feigned issue.*—If either party in the course of the hearing, whether before the court or an auditor, prefer to have the decision of a jury upon a disputed fact, he may do so by making a written request to that effect.<sup>5</sup> It is not error for an auditor himself to decide questions of fraud or fact where no issue was asked for to be tried by a jury.<sup>6</sup>

*Who may apply.*—The words of the act are "any person interested."<sup>7</sup> A simple contract-creditor, whose claim is not secured by lien or judgment, is not entitled to demand an issue.<sup>8</sup> But where there is a question whether a particular encumbrance was discharged by the sheriff's sale, one who purchased from the sheriff's vendee is "a party interested" who may demand an issue.<sup>9</sup> Any creditor having a claim upon the fund may apply for an issue.<sup>10</sup> A lien-creditor only is entitled to an issue;<sup>11</sup> hence the heir at law of a mortgagor is not entitled to an issue to try the validity of the mortgage under which the sale was made.<sup>12</sup>

*Time of application.*—After the decree of distribution it is too late to apply for an issue.<sup>13</sup> It has been held that since the right to trial

<sup>1</sup> Larimer's Appeal, 10 Harris 41.

<sup>2</sup> Cowden's Estate, 1 Barr 283.

<sup>3</sup> Appeal of the Borough of Easton, 11 Wright 256.

<sup>4</sup> O. C. Rules, 2, 3, Walker's Rules 80.

<sup>5</sup> Act 16th June 1836, § 87, Purd. Dig. 446, pl. 104, Pamph. L. 777.

<sup>6</sup> Mahler's Appeal, 2 Wright 220.

<sup>7</sup> Act 16th June 1836, § 87.

<sup>8</sup> Smith v. Reiff, 8 Harris 364.

<sup>9</sup> Towers v. Tuscarora Academy, 8 Barr 297.

<sup>10</sup> Reigart's Appeal, 7 W. & S. 267; Bichel v. Rank, 5 Watts 140.

<sup>11</sup> Housekeeper's Appeal, 13 Wright 141.

<sup>12</sup> Ibid.

<sup>13</sup> Myers's Appeal, 2 Barr 463; Wright's Appeal, 1 Casey 373.

by jury is a constitutional right, of which the court could not deprive the party, and which could not be waived by implication, a demand for an issue was in time, though made after all the evidence had been heard by the court, and the counsel on both sides had concluded their arguments;<sup>1</sup> and in another case, though made two months after the filing of the auditor's report.<sup>2</sup> But recent decisions require greater vigilance on the part of claimants, and where, on the application of a claimant, a final decree of distribution had been opened, a commissioner appointed to take testimony, the testimony returned, and the court was about to render its decree upon the facts found, it was held to be too late for the claimant to apply for an issue.<sup>3</sup> And more recently, in proceedings before an auditor appointed by the Orphans' Court, it has been held that a party cannot take his chance of a favorable finding of facts by the auditor, and when the report is adverse, apply for an issue; and the application is too late if made after the result of the hearing before the auditor is ascertained:<sup>4</sup> and an application made eight days after the audit is closed, but before the auditor's report is prepared and filed, is, in very strict practice, made too late.<sup>5</sup> In the District Court of Philadelphia the application must be presented to the auditor not later than forty-eight hours after the hearing has been concluded.<sup>6</sup>

*Mode of application.*—The request for an issue must be in writing,<sup>7</sup> stating distinctly the specific facts in dispute, to ascertain which the party desires an issue,<sup>8</sup> and the applicant must also make affidavit that there are material facts in dispute in reference to the distribution, setting forth the nature and character of such facts.<sup>9</sup> Whether the affidavit of the party's agent or attorney would be sufficient has been doubted.<sup>10</sup> It is sufficient if the affidavit set out that material facts are in dispute, stating their nature and character:<sup>11</sup> it is not sufficient to allege that there are disputed facts, without stating what they are; the affiant should at least, to the best of his knowledge and belief, allege the existence of certain facts material to the question, and that the truth of these facts is disputed by other persons, or that certain facts are alleged by the other party, which, to the best of his knowledge and belief, do not exist, and are disputed by him.<sup>12</sup> So it is not enough for a junior encumbrancer to make affidavit that a prior judgment was confessed by collusion between the parties thereto, for the purpose of hindering and delaying certain other creditors; but he must set forth that there are

<sup>1</sup> Trimble's Appeal, 6 Watts 133.

<sup>2</sup> Reigart's Appeal, 7 W. & S. 267.

<sup>3</sup> Seip's Appeal, 2 Casey 176.

<sup>4</sup> Bradford's Appeal, 5 Casey 513; Sharp's Appeal, 3 Grant 260.

<sup>5</sup> Barnes's Appeal, S. Ct., 18 Leg. Int. 156; s. c., 3 Grant 315.

<sup>6</sup> Rule XV., Walker's Rules 11.

<sup>7</sup> Act 16th June 1836, § 87, Purd. Dig. 446, pl. 104, Pamph. L. 777.

<sup>8</sup> McDaniel v. Haly, 1 Miles 353; Dickerson's Appeal, 7 Barr 255; Christophers v. Selden, 4 Casey 165;

Wright's Appeal, 1 Casey 373.

<sup>9</sup> Act 20th April 1846, § 2, Purd. Dig. 447, pl. 105, Pamph. L. 411. This is not confined to the single case of a lien-creditor becoming purchaser at a sheriff's sale, but applies to all judicial sales: Biddle v. King, D. C. Phila., 1 Phila. Rep. 394.

<sup>10</sup> Seip's Appeal, 2 Casey 176.

<sup>11</sup> Lippincott v. Lippincott, D. C. Phila., 1 Phila. Rep. 396.

<sup>12</sup> Brinton v. Perry, D. C. Phila., 1 Phila. Rep. 436.

material facts in dispute, and also the nature and character of those facts.<sup>1</sup> A fact is properly said to be in dispute when it is alleged by one party and denied by the other, and by both with some show of reason: a mere naked allegation, without evidence or against the evidence, cannot create a dispute within the meaning of the law.<sup>2</sup>

Where the demand for the issue was in time, and the disputed facts were explicitly set forth, and were material if true, it was error to refuse the issue.<sup>3</sup>

The affidavit is not conclusive upon the applicant as to the grounds of the application, but its defects may be supplied upon the hearing of the motion.<sup>4</sup>

The auditor does not grant the issue, he only reports the request for it to the court, which, by the rules of the District Court of Philadelphia, he must do forthwith, and must annex to such report the request and affidavit.<sup>5</sup> In the Orphans' Court of Philadelphia the demand for an issue is a question for the auditor to decide in the first instance: he must determine, from the evidence on which the demand is founded, whether the alleged fact is material to the case; if he deem it proper to recommend an issue, it is his duty to specify in his report the fact or facts in dispute; if he decide against an issue, he should in his final report state that an issue had been demanded and refused, and also annex the evidence submitted, if requested by the parties.<sup>6</sup>

*Grounds for granting the issue.*—Where there is a question of fact to be decided, as whether judgments in contest are collusive, it is the duty of the court to grant an issue; it would be error to refuse it.<sup>7</sup> So the court will award an issue to enable a subsequent execution-creditor to ascertain whether the prior execution was not voluntarily given by the defendant when in insolvent circumstances, with intent to evade the act against preferences in assignments.<sup>8</sup> And where the controversy is between separate and partnership creditors, an issue should be granted, on application, to ascertain whether the land, from the sale of which the fund arises, had been purchased for partnership purposes, and whether a certain joint judgment against the partners was founded on a partnership debt.<sup>9</sup> So a creditor can attack a judgment collaterally only for collusion; if he assails it on the ground of want of consideration, he must do so by obtaining an issue directed as to the judgment to ascertain the amount due upon it.<sup>10</sup>

But unless there appears to be a dispute as to facts the court are not bound, though so requested, to direct an issue to determine the right to the proceeds.<sup>11</sup> And a party is not entitled to an issue upon

<sup>1</sup> Robinson's Appeal, 12 Casey 81.

<sup>2</sup> Knight's Appeal, 7 Harris 494, per BLACK, C. J.

<sup>3</sup> Benson's Appeal, 12 Wright 159.

<sup>4</sup> Overholt's Appeal, 2 Jones 225.

<sup>5</sup> Rule XV., Walker's Rules 11.

<sup>6</sup> Beehler's Estate, O. C. Phila., 3 Phila. Rep. 254.

<sup>7</sup> Bichel v. Rank, 5 Watts 140.

<sup>8</sup> Steinmetz v. Fraley, D. C. Phila., 1

Phila. Rep. 202.

<sup>9</sup> Overholt's Appeal, 2 Jones 222.

<sup>10</sup> Lewis v. Rogers, 4 Harris 18.

<sup>11</sup> Dickerson's Appeal, 7 Barr 255; Beehler's Estate, O. C. Phila., 3 Phila. Rep. 254. Such issue, without specifying any particular matter in dispute, would be irregular: Russel v. Reed, 3 Casey 166.

a mere allegation without evidence, or against the evidence; therefore, where the defendant before the auditor claimed to set off his book-account against a judgment, and the plaintiff in the judgment submitted book-accounts to a greater amount than that of defendant, upon which the auditor allowed the judgment, and the defendant excepted to the report on the ground that the judgment should not have been allowed *because* it was paid, and an issue was asked to try whether the judgment was paid, the court held that there was no fact in dispute for the trial of which the defendant was entitled to an issue.<sup>1</sup> And mere delay in presenting for payment a sealed note is not sufficient of itself to authorize the granting of an issue.<sup>2</sup>

A feigned issue ought not to be granted, except to try definite and clearly-defined questions of fact; it is error to direct an issue to try a question of law.<sup>3</sup> And whether a judgment be a lien upon the fund is a question of law, unless it depends upon some disputed fact; in which case such controverted fact must be stated, otherwise the award of the issue will be erroneous.<sup>4</sup>

If the court refuse the issue, the applicant may have a writ of error or appeal in like manner as in other cases where the writ lies.<sup>5</sup> But the Supreme Court will not reverse for a refusal to direct an issue where there are no facts to submit, or their determination would not affect the result.<sup>6</sup>

If no ground be laid for the issue, it would be irregular to award it.<sup>7</sup>

Upon granting the issue, it is discretionary with the court, so soon as the proceeds of the sale are paid into the court, upon the application of the parties appearing by the record *prima facie* entitled to the fund, to order it to be invested *pendente lite* in the debt of the United States, or some other sufficient security, subject to the decree of the court.<sup>8</sup>

*Form of the issue.*—The court by whom the issue is directed may and should mould the issue into the form calculated to answer the end proposed; and if it is found that this has not been done, the court may arrest the proceedings and begin anew.<sup>9</sup> The issue should be strictly confined to the ascertaining of the facts in dispute as stated to the court.<sup>10</sup> The whole subject of the distribution is not to be comprised within the issue; the issues may be as numerous as the subjects of disagreement, but each issue may be limited to a single inquiry; and all the issues, with the leave of the court,

<sup>1</sup> Knight's Appeal, 7 Harris 493.

<sup>2</sup> Hummel's Estate, O. C. Phila., 3 Phila. Rep. 442.

<sup>3</sup> Thompson's Appeal, 12 Casey 418.

<sup>4</sup> Christophers v. Selden, 4 Casey 165.

<sup>5</sup> Act 20th April 1846, § 2, Purd. Dig. 447, pl. 105, Pamph. L. 411.

<sup>6</sup> Dougherty's Estate, 9 W. & S. 192; Dickerson's Appeal, 7 Barr 255; Overholt's Appeal, 2 Jones 224, per ROGERS, J.

<sup>7</sup> Dougherty's Estate, 9 W. & S. 197; Overholt's Appeal, 2 Jones 224; Biddle v. King, D. C. Phila., 1 Phila. Rep. 394.

<sup>8</sup> Act 20th April 1846, § 3, Purd. Dig. 447, pl. 106, Pamph. L. 411.

<sup>9</sup> Stewart v. Stocker, 1 Watts 135; Ringwalt v. Ahl, 12 Casey 336.

<sup>10</sup> McDaniel v. Haly, 1 Miles 353; Shertzer's Executors v. Herr, 7 Harris 34; Christophers v. Selden, 4 Casey 165.



may be tried by the same jury.<sup>1</sup> An issue to try "the right to the money" in court, without specifying any particular fact in dispute, is irregular.<sup>2</sup>

The court should order who are to be the parties, plaintiff and defendant;<sup>3</sup> and the actual parties should be named on the record, because the verdict and judgment only enure to the benefit of the actual plaintiff, and on the other hand if he fails he alone is prejudiced thereby.<sup>4</sup> But one claiming adversely to the title levied on and sold by the sheriff, cannot be compelled to become a party to an issue to determine the right to the proceeds; the title of such person can be decided only in ejectment by the sheriff's vendee.<sup>5</sup> Only the excepting creditors are parties to the issue.<sup>6</sup>

The cause should be put in form by the counsel of the parties, by filing a declaration and joinder in form; and where a petition was presented for an issue, and no other pleadings were filed or issue framed between the parties, except the petition and the order for an issue, the Supreme Court will send the record back to have an issue framed, and the facts found in regular and legal form.<sup>7</sup>

A feigned issue, ordered by the court to try the validity of a confessed judgment, is entirely under its control; it is competent for the court to direct not only what shall be tried, but the form of the issue, and who shall be the parties.<sup>8</sup>

*Trial, evidence, costs.*—The trial of the issue is subject to all the rules in relation to jury trials.<sup>9</sup> On an issue ordered to try the validity of a confessed judgment, the court may control the conduct of the trial, and even order the parties themselves to be examined.<sup>10</sup> But on an issue directed for the purpose of trying disputed facts, the court cannot withdraw the whole case from the jury, and decide the law and facts themselves.<sup>11</sup> On the trial of an issue awarded at the instance of a junior lien-creditor, to ascertain how much was due on the first mortgage, and what portion of it was founded upon usurious consideration, the validity of the mortgage may be questioned on the ground of usury.<sup>12</sup> Where a special court is necessary, in the case of separate sales of defendant's lands in several counties, with one or more liens existing against the whole, the judge of such special court must try the necessary issues of fact in the proper county where the same may be formed.<sup>13</sup>

On an issue to ascertain whether a judgment is paid, the plaintiff, who was also plaintiff in the judgment, is not entitled to begin and conclude.<sup>14</sup>

The object of an issue is to narrow the controversy to a particular point without reference to what lies beyond it; and it must be decided by the jury with a view to its own truth or falsehood,

<sup>1</sup> *McDaniel v. Haly*, 1 Miles 353.

<sup>2</sup> *Shertzer's Executors v. Herr*, 7 Harris 34; *Russel v. Reed*, 3 Casey 166.

<sup>3</sup> *Muhlenberg v. Brock*, 1 Casey 517.

<sup>4</sup> See *post*, p. 1084, "Effect of Issue."

<sup>5</sup> *Wolf v. Payne*, 11 Casey 97.

<sup>6</sup> *Steel v. Bridenback*, 7 W. & S. 150; *Tombs's Appeal*, 9 Barr 61.

<sup>7</sup> *Muhlenberg v. Brock*, 1 Casey 517.

<sup>8</sup> *Ringwalt v. Ahl*, 12 Casey 336.

<sup>9</sup> *McDaniel v. Haly*, 1 Miles 353.

<sup>10</sup> *Ringwalt v. Ahl*, 12 Casey 336.

<sup>11</sup> *Muhlenberg v. Brock*, 1 Casey 517.

<sup>12</sup> *Greene v. Tyler*, 3 Wright 361.

<sup>13</sup> Act of 13th April 1843, § 9, *Purd. Dig.* 445, pl. 90, *Pamph. L.* 235.

<sup>14</sup> *Horner v. Hower*, 13 Wright 475.

without reference to the bearing which it may have on the controversy out of which it arises; it is a wrong idea that no evidence, however pertinent to the issue, should be admitted which would have been irrelevant at the audit: the only question which the court can consider in rejecting or admitting evidence, is whether the evidence is pertinent to the issue: the pertinency of the issue itself is another and a very different question, which cannot be considered until the court come to enter judgment on the record.<sup>1</sup> On an issue to try whether a judgment has been paid, the question is one of fact, and is for the jury exclusively.<sup>2</sup> When the question is whether or not a certain judgment has been paid, a written agreement between the parties to it, showing that it was designed as a collateral security, is admissible in evidence on the part of those opposing the judgment, in connection with proof that endorsements designed to be secured by it had been paid.<sup>3</sup> Evidence of the confession of other judgments, and of the solvency or insolvency of the defendant, is admissible.<sup>2</sup> In a contest between execution-creditors, the sheriff's return to one of the executions is only *prima facie* evidence.<sup>4</sup> When the issue is between creditors, the defendant in execution not a party to the issue, is a competent witness to prove that the judgment in issue has been paid.<sup>5</sup> So, the defendant in the execution may be examined when his interest is equally balanced.<sup>6</sup> In an issue framed to try whether a judgment is fraudulent as to creditors, a judgment-creditor of the defendant whose judgment will be affected by the decision of the issue, but who is not a party to the issue, may become a competent witness by disposing of his judgment; provided the act was done *bona fide*, and not dictated by necessity, to give it effect by his testimony.<sup>7</sup> A judgment-creditor whose interest is not affected by the result, and who is not a party to the issue, is a competent witness.<sup>8</sup>

The costs incurred in several feigned issues framed for the purpose of trying the rights of several creditors to the fund, must be paid severally out of the money awarded to pay each particular debt.<sup>9</sup> Where the sheriff was made defendant in the issue without any specific direction as to the costs, and on verdict for the plaintiff the court entered judgment with costs, the Supreme Court affirmed the judgment for costs.<sup>10</sup>

*Effect of issue.*—The results of the issue as to facts are to be received implicitly, and incorporated with such other facts as the parties in interest may consent to, or as the court, when the parties do not expressly agree, shall itself ascertain: all controversy as to the facts must terminate with the finding of the issue.<sup>11</sup> The verdict and judgment in the issue affect only such of the creditors as

<sup>1</sup> McDonough v. Norris, D. C. Phila.,

<sup>2</sup> Phila. 266.

<sup>3</sup> Horner v. Hower, 13 Wright 475.

<sup>4</sup> Smith's Executors v. Wagenseller,  
9 Harris 491.

<sup>5</sup> Lowry v. Coulter, 9 Barr 349.

<sup>6</sup> Smith's Executors v. Wagenseller,  
9 Harris 491; Ferree v. Thompson, S.  
Ct., 23 Leg. Int. 253.

<sup>7</sup> Stewart v. Stocker, 1 Watts 135;

Guillou v. Healy, 1 Phila. 335; Ferree  
v. Thompson, S. Ct., 23 Leg. Int. 253.

<sup>8</sup> Gates v. Johnston, 3 Barr 52.

<sup>9</sup> Gicker's Administrators v. Martin,  
14 Wright 138.

<sup>10</sup> Cowden's Estate, 1 Barr 267.

<sup>11</sup> Hipple v. Hoffman, 2 Watts 85.

<sup>12</sup> McDaniel v. Italy, 1 Miles 353.

were parties thereto. Therefore, where one of the lien-creditors singly applied for an issue to try the alleged fraudulency of a conflicting encumbrance, which was found for him, the verdict cannot be used by the other lien-creditors who remained quiescent.<sup>1</sup> And on the same principle where in an issue, framed between the first and second of three judgment-creditors, to try whether the first judgment is fraudulent, the jury find that it is valid, but on another issue between the first and third judgment-creditors, to try the validity of the first judgment, it is found to be fraudulent, the first judgment is nevertheless entitled to so much of the proceeds as would have gone to the second in a contest between the second and third, for the first being valid against the second, is entitled to the benefit of the priority which the second has over the third.<sup>2</sup> So, where a feigned issue was directed between a creditor, under whose judgment the land was sold, and the judgment-debtor, to determine whether the judgment had been paid; and on the trial the debtor claimed and received credit for the amount of the sale, which, however, had not at that time been received by the sheriff, and on the trial judgment was rendered for the debtor, this did not conclude other judgment-creditors who were not parties to the issue, but after the money had been paid into court, these latter might show that the judgment had been paid independently of the proceeds of the sale.<sup>3</sup> And, where the issue was granted irregularly, as in the case of an issue granted several years after the decree, to try whether a judgment which had participated in the proceeds was fraudulent as to creditors, it is not conclusive on the plaintiff in the contested judgment, even though he appear to the issue; and the verdict and judgment therein will not be evidence in another suit to show that the judgment was fraudulent.<sup>4</sup>

*Error.*—The judgment upon the issue is subject to a writ of error in like manner as in other cases.<sup>5</sup> And upon such writ of error the whole record is to be returned, and it is competent for any person aggrieved by the decree of distribution to take exceptions thereto, if the judgment upon the issue be affirmed.<sup>6</sup> If the Supreme Court affirm the judgment upon the issue, they will then entertain exceptions to the decree of distribution made by the court below, upon the whole case, and order distribution accordingly. But should the Supreme Court reverse the judgment on the issue, *it seems* that they would remit the record to the court below for a trial thereon.<sup>7</sup>

If the writ of error is not taken within twenty days from the decree of distribution, the court may order the money to be paid according to the decree.<sup>8</sup> The writ of error may be taken out before the final decree, but the Supreme Court discourages this practice on

<sup>1</sup> Schulze's Appeal, 1 Barr 251; *judice. Ibid.*

Tombs's Appeal, 9 Barr 61; Schick's Appeal, 13 Wright 380; Schick v. Pharo, *Ibid.* 384.

<sup>2</sup> Toombs's Appeal, 9 Barr 61.

<sup>3</sup> Troutman's Appeal, 11 Harris 491.

<sup>4</sup> Martin v. Gernandt, 7 Harris 124.

Such issue is irregular, being *coram non*

<sup>5</sup> Act 16th June 1836, § 87, *Purd. Dig.* 446, pl. 104, *Pamph. L.* 777. See *ante*, 674, *et seq.*, "Error."

<sup>6</sup> *Ibid.*, § 88.

<sup>7</sup> *McDaniel v. Haly*, 1 Miles 353.

<sup>8</sup> Act 16th June 1836, § 90, *Purd. Dig.* 447, pl. 109, *Pamph. L.* 777.

the ground that it protracts litigation.<sup>1</sup> And it has been said that instead of suing out a writ of error to the judgment on the feigned issue, the better practice is to bring up the whole record by appeal after the decree of distribution.<sup>2</sup> But the court have since held that the judgment on the feigned issue is conclusive of the facts found by the verdict, unless reversed on writ of error, and cannot be reviewed on an appeal from the decree of distribution.<sup>3</sup>

The party suing out the writ of error must make oath or affirmation that his writ of error is not intended for delay, and in order to make it a *supersedeas* he must also give security by recognisance, with sufficient surety, in the court below or before one of the judges thereof, to prosecute his writ of error with effect, and to pay all costs which may be adjudged against him.<sup>4</sup>

Where a writ of error has been taken out, the court below may order the fund to be invested in the State debt or that of the United States, or upon real security; or it may order the money to be paid in accordance with the decree of distribution, if the distributees shall give sufficient real security to refund the same with interest thereon, or so much thereof as shall be required by the court, if such decree shall be reversed or altered, and in such case the order of restitution may be enforced by a writ of *feri facias* or otherwise.<sup>5</sup>

Upon an issue to try whether a certain judgment was fraudulent as to creditors, a direction by the court to the jury, that a judgment fraudulent in part is void in the whole as to creditors, is not erroneous.<sup>6</sup> Where such issue was framed to try, on the pleas of *non assumpsit* and payment with leave, &c., "whether any, and if any, what amount was due from the defendant to the plaintiff at the time the judgment was confessed," in strictness this was wrong in form, it should have been to try "whether the judgment was collusive as to creditors or not:" but where the plaintiff was not prevented by the form of the issue from putting forth the strength of his case, and has not been prejudiced by the informality, he will not be permitted to assign it for error.<sup>7</sup>

After verdict and judgment in the feigned issue, a decree of the court as to payment of the costs of the issue is subject to revision by appeal, not by writ of error: the court below directed the costs of the issue to be paid first out of the fund; though this was erroneous, the remedy selected, a writ of error, precluded the Supreme Court from giving the plaintiff that relief to which he was clearly entitled.<sup>8</sup>

The issue having been decided, the auditor proceeds to make his report, which has been suspended during its pendency. Though he may if he please go on to make an alternative report adapted to

<sup>1</sup> *Christophers v. Selden*, 4 Casey 165.

<sup>2</sup> *Brown's Appeal*, 2 Casey 490.

<sup>3</sup> *Garrison's Appeal*, 2 Wright 531.

<sup>4</sup> Act 16th June 1836, § 91, *Purd. Dig.* 447, pl. 110, *Pamph. L.* 777.

<sup>5</sup> *Ibid.*, § 92. In practice the court will not permit even an undisputed dividend to be taken out of court till

the issue is decided: *Pepper v. Bay- ington*, D. C. Phila., Sept. 1848. See *McDaniel v. Italy*, 1 Miles 353.

<sup>6</sup> *Gates v. Johnston*, 3 Barr 52. But see *Gicker's Administrators v. Martin*, 14 Wright 138.

<sup>7</sup> *Gates v. Johnston*, 3 Barr 52.

<sup>8</sup> *Snyder v. Kunkleman*, 2 Watts 416.

either contingency of the result upon the issue, yet nothing is gained in point of time by this course, for the court will not allow even an undisputed dividend to be taken out of court while the issue is pending,<sup>1</sup> and in most cases such an alternative report would not be possible.

*Filing the report.*—Upon this point the practice differs. In Philadelphia in the District Court the report is filed in open court and upon motion confirmed "*nisi*" when filed; and unless exceptions be made thereto in writing, and filed within eight days after the confirmation *nisi*, the report is confirmed absolutely: Provided, That notice must be given by the auditor to the parties who appeared before him, or their attorneys, of the time and place of making his report, and that proof of such notice be filed of record.<sup>2</sup> In the Common Pleas and Orphans' Court the auditor must give the parties ten days' notice of his intention to file his report on a day designated, and must allow them access to the report.<sup>3</sup> And in the Orphans' Court auditors' reports must be filed on the stated days of meeting.<sup>4</sup> Where there are no exceptions, auditors' reports are confirmed absolutely in the Common Pleas on the third Saturday after the day of filing,<sup>5</sup> and in the Orphans' Court at the next stated session.<sup>6</sup>

The practice of the Common Pleas and Orphans' Court, in requiring notice to be given to the parties before filing the report, is also that of the Supreme Court at Nisi Prius<sup>7</sup> and of some of the subordinate courts, as well as of the United States Courts for the Eastern District,<sup>8</sup> and has been commended by the Supreme Court, because it gives the parties an opportunity of making their exceptions before the auditor, and allows him to reconsider and, if necessary, amend his report before filing it, and thus no report can be set aside except on points to which the auditor's attention has been directed, and then the same point is distinctly presented to the court and reviewed by them.<sup>9</sup> In the Common Pleas and Orphans' Court of Philadelphia, unless the report is filed within sixty days after the appointment of the auditor, such appointment may be vacated.<sup>10</sup>

After the auditor has filed one report he has no authority to file a supplementary report, without a recommitment to him.<sup>11</sup>

The report must be recorded by the prothonotary.<sup>12</sup>

*Exceptions.*—If any party is dissatisfied with the auditor's ruling at the hearing, or with the conclusion at which the auditor has arrived, he may except to the report. And each person should except for himself: he cannot by appeal take advantage of excep-

<sup>1</sup> *Pepper v. Bavington*, D. C. Phila., Sept. 1848. See *McDaniel v. Haly*, 1 Miles 353.

<sup>2</sup> Rule XVI., Walker's Rules 11.

<sup>3</sup> Rule VIII., § 2, C. P., Walker's Rules 46; Rule III., O. C., Walker's Rules 80.

<sup>4</sup> These were formerly the first and third Fridays in each month: *Ibid.* But now every Saturday during the term.

<sup>5</sup> C. P., Rule VIII., § 3.

<sup>6</sup> O. C., Rule III.

<sup>7</sup> Rule VI., Walker's Rules 103.

<sup>8</sup> Rule V., Walker's Rules 203. In the U. S. Courts two weeks' notice is required: *Ibid.*

<sup>9</sup> *Mengas's Appeal*, 7 Harris 221, per LOWRIE, J.

<sup>10</sup> C. P., Rule VIII., § 5, Walker's Rules 47; O. C., Rule II., § 2, Walker's Rules 80.

<sup>11</sup> *Benson's Appeal*, 12 Wright 159.

<sup>12</sup> Act 25th April 1850, § 19, *Purd. Dig.* 856, pl. 11, *Pamph. L.* 572.

tions filed by others and dismissed by the court after argument.<sup>1</sup> Exceptions must be in writing, and in the District Court of Philadelphia must be filed within eight days after the filing of the report.<sup>2</sup> In the other courts mentioned above, no exception will be received unless the exceptant has filed the same with the auditor, whose duty is, on such exception being filed, to re-examine the subject and amend his report, if in his opinion such exceptions are in whole or in part well founded; and parties excepting before the court will be confined to the exceptions made before the auditor.<sup>3</sup> And the Supreme Court will not consider exceptions not filed according to the rules of the court below.<sup>4</sup>

Every exception should point specifically to the very error complained of, otherwise it cannot properly be noticed: general exceptions display a want of skill, and also imply that no particular error has been discovered.<sup>5</sup> The parties in interest may agree that the report of auditors, on the settlement of an executor's or trustee's account, shall be final and conclusive, and that no exceptions shall be taken thereto, and the courts will enforce such agreement by disregarding exceptions filed in violation thereof: such agreement does not take away the right of the court to revise the report, but it destroys the parties' right to except to it: the parties to such agreement cannot thereby abridge the powers of the court, nor bind creditors or other strangers thereto, but as between the parties it will be conclusive.<sup>6</sup>

After hearing argument upon the exceptions the court may either confirm the report, or modify it, or set it aside, or refer it back to the auditor for amendment. Where facts found by the auditor are excepted to, the court, if they cannot approve the report, may, at the request of either party, order a jury trial, and then the very facts upon which the legal conclusion depends should be distinctively and severally stated in the issue, so that there can be no dispute as to what is to be found: but the court may itself correct the report.<sup>7</sup> If the facts involve a question as to the alleged fraudulency of a judgment as to creditors, the judge of the court having jurisdiction, sitting as chancellor, may and ought to decide upon them without the intervention of a jury: such a reference is only made in equity to satisfy the conscience of the court concerning doubts as to the facts, and is therefore discretionary.<sup>8</sup> But in exceptions on matters of fact the error should be plain, and the burden is on the exceptant.<sup>9</sup> And the District Court have gone so far as to hold that the decision of an auditor upon the facts of a case is conclusive; for the party had a right to demand an issue, and not having exercised that right,

<sup>1</sup> Constine's Appeal, 1 Grant 242.

<sup>2</sup> Rule XVI., Walker's Rules 11. A similar rule in the Orphans' Court was held valid: Mylin's Estate, 7 Watts 64.

<sup>3</sup> C. P., Rule VIII., § 2; O. C., Rule III.; S. Ct. N. P., Rule VI.; U. S. Courts, Rule V.

<sup>4</sup> Mylin's Estate, 7 Watts 64; Irwin's

Appeal, 5 Whart. 577.

<sup>5</sup> Mengas's Appeal, 7 Harris 221.

<sup>6</sup> Miller's Appeal, 6 Casey 478.

<sup>7</sup> Mengas's Appeal, 7 Harris 221.

<sup>8</sup> Baker v. Williamson, 2 Barr 119; Johns v. Erb, 5 Barr 232.

<sup>9</sup> Stehman's Appeal, 5 Barr 413; Ludlam's Estate, 1 Harris 190; Haines v. Barr, D. C. Phila., 7 Leg. Int. 521.

must be taken to have acquiesced in the submission of the matter to the auditor.<sup>1</sup>

For reasons that would justify the granting of a new trial by jury, the court should remand the case for rehearing and report to the same auditor.<sup>2</sup> And when a report is referred back to the auditor for amendment, he is not obliged to open the audit to admit new evidence for creditors.<sup>3</sup> But he is bound to hear a new claim not before presented to him.<sup>4</sup> If the rehearing be for reasons personal to the auditor, then another may be substituted in his place.<sup>5</sup> The court will itself correct such palpable errors as arise from mere mistake of computation.<sup>6</sup> And the Orphans' Court, on setting aside the report on a matter of fact, may draw to itself the decision, without referring it a second time to an auditor.<sup>7</sup>

*Decree of distribution.*—Upon confirmation of the report the court make a decree of distribution. This in practice is not drawn up in form unless there have been exceptions to the report, but the money is paid by the prothonotary in accordance with the schedule accompanying the report. It is said that prior to making their decree it is the duty of the court to cause notice to be given either personally, or by such advertisements as they may deem proper.<sup>8</sup> This, which is required by the act, is done by the auditor, when the matter is referred to an auditor, but where the court hear the claimants themselves it should be done by the court. Claimants must present their claims before final decree of distribution.<sup>9</sup> But any time before final decree will suffice, and therefore where an auditor's report has been filed, but is referred back for revision, a claimant may present his claim before the auditor.<sup>10</sup>

*Effect of decree.*—The decree, if not appealed from, is conclusive upon parties and privies as to matters directly decided.<sup>11</sup> And where the auditor took depositions, after notice to the sheriff's vendee, and to one who afterwards purchased from him, and it was proved that the sheriff's vendee agreed to buy at the sheriff's sale subject to the mortgage, whereupon the court decreed the proceeds

<sup>1</sup> *Yardley v. Holby*, D. C. Phila., Saturday, June 26th 1852. Exceptions to auditor's report. *Per curiam*. The decision of an auditor upon the facts of a case is conclusive. The party had a right to demand an issue, and not having exercised that right, must be taken to have acquiesced in the submission of the matter to the judgment of the auditor. Of the competency of the witness Cromwell there can be no doubt. He was the assignor of one of the claims, and was called by the other lien-creditors to prove that the claim was paid by the defendant before he assigned. The ground of objection was, that one dollar of the consideration of the assignment remained unpaid, as came out in the course of his testimony. But that was no claim on the fund; a personal claim only against the assignee. We think, therefore, the

witness was rightly admitted.

As to the question presented under the Exemption Law, we also agree with the auditor, that the claim of the defendant in the case of real estate must be made under the *fi. fa.*, and before a *venditioni exponas*; otherwise it is waived. Exceptions dismissed.

<sup>2</sup> *Mengas's Appeal*, 7 Harris 221; *Hottenstein's Appeal*, 2 Grant 301.

<sup>3</sup> *Donnelly's Estate*, O. C. Phila., 3 Phila. Rep. 18.

<sup>4</sup> *Ross's Estate*, 9 Barr 17.

<sup>5</sup> *Mengas's Appeal*, 7 Harris 221.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Hottenstein's Appeal*, 2 Grant 301.

<sup>8</sup> *Boal's Appeal*, 2 Rawle 38, per ROGERS, J.

<sup>9</sup> *Finney's Appeal*, 3 Barr 312; *Ross's Estate*, 9 Barr 17.

<sup>10</sup> *Ross's Estate*, 9 Barr 17.

<sup>11</sup> *Noble v. Cope*, 14 Wright 17.

to other and subsequent liens, the purchaser from the sheriff's vendee is concluded by the decree, and holds subject to the mortgage.<sup>1</sup> For he was bound without notice to come in at the return of the writ and defend his interest at his peril.<sup>2</sup> So a creditor who has not presented his claim is bound by the decree: such decree is a final disposition of the whole matter, which passes *in rem judicatam*, and, being unappealed from, binds him in the Supreme Court no less than in the court below.<sup>3</sup>

So an award of money to one whose judgment is no lien, cannot be questioned in a collateral proceeding in the same court.<sup>4</sup> And the District Court of Philadelphia will not examine into a decree of distribution made by the Orphans' Court; if the Orphans' Court had jurisdiction, their decree cannot be disturbed collaterally, whether right or wrong.<sup>5</sup>

But the court, where they have made a mistake in the distribution, may, upon petition by the party aggrieved, even after the lapse of the twenty days allowed for an appeal, review their decision and grant relief.<sup>6</sup> But where the court have wrongly decided against a claimant, they cannot correct the mistake, on another sale of defendant's property, by substituting such party to the lien of the creditor who improperly received the money on the first distribution.<sup>7</sup>

But, as the judgment of a court of competent jurisdiction is not evidence of a matter incidentally cognisable by it, or of any matter to be inferred from it, it follows that the order of the Common Pleas to credit the purchaser at sheriff's sale with the amount of his judgment, is not conclusive evidence of the validity of such judgment, where no question as to the validity of such judgment presented itself, and none was therefore adjudicated; and the case is not altered by the fact that such sale was made under a valid judgment.<sup>8</sup> And a report of the auditor, confirmed by the court, awarding a portion of the fund to a certain judgment conditionally, when it should be paid into court, will not operate as a discharge of the judgment *pro tanto*, if the fund awarded to it was never paid in, and nothing was in fact received upon it.<sup>9</sup>

*Appeal from decree of distribution.*—It follows, from what has been said, that the decree of distribution must be attacked, if at all, not collaterally but directly. This is done through the appeal provided by the Act of 1836.<sup>10</sup> This appeal is only given where the distribution is made without the intervention of a jury, and therefore where a claimant objects to the judgment upon a verdict in a feigned issue, his proper course is not to appeal, but to bring a writ of error, as already explained.

It should be observed here that each claimant, objecting to the

<sup>1</sup> Towers v. Academy, 8 Barr 297.

<sup>2</sup> Ibid.

<sup>3</sup> Finney's Appeal, 3 Barr 312.

<sup>4</sup> Yerkes's Appeal, 8 W. & S. 224.

See Finney's Appeal, 3 Barr 312.

<sup>5</sup> Jackson v. Dickerson, D. C. Phila., 21 Leg. Int. 36.

<sup>6</sup> Beck's Appeal, 3 Harris 406. Of

course the application should be made at an early day: in the case cited it was made at the next term.

<sup>7</sup> Yerkes's Appeal, 8 W. & S. 224.

<sup>8</sup> Martin v. Gernandt, 7 Harris 124.

<sup>9</sup> Masser v. Dewart, 10 Wright 534.

<sup>10</sup> Sect. 89, Purd. Dig. 447, pl. 108, Pamph. L. 777.



decree, should appeal for himself, for, however just his claim, the Supreme Court will not take notice of it on an appeal by another claimant.<sup>1</sup>

*Who may appeal.*—The act allows “any person aggrieved by the decree” to appeal.<sup>2</sup> But it applies only to judgment or lien creditors of the defendant in execution; his contract creditors, who have acquired no judgment or lien, have no right to be heard as to the distribution of the proceeds, and are not entitled to writ of error.<sup>3</sup> A purchaser from the sheriff’s vendee is a party who may appeal, and is bound by the decree if he does not.<sup>4</sup> And when the sheriff has in his hands the proceeds of his sale of land, he has a right *pro interesse suo* to appeal from the decree of distribution.<sup>5</sup>

Creditors, whose claims are not submitted to the auditor before his report is closed, have no status in court, and cannot appeal from the decree.<sup>6</sup> And where the defendant in the execution took no part in the proceedings before the auditor, and filed no exceptions to the report, he cannot by appeal take advantage of exceptions filed by his creditors, which were heard and dismissed by the court below, who confirmed the report absolutely.<sup>7</sup>

A person who is neither party nor privy to the proceeding, and whose rights cannot be affected by the decree, cannot appeal.<sup>8</sup> So, though a rule upon a bank, where the deceased sheriff kept his account, to pay the proceeds of an execution into court for distribution is void, for want of jurisdiction, yet if the bank submits to the rule, and pays the money into court, and the court makes decree of distribution, the bank, having no interest in the distribution, cannot appeal from that decree.<sup>9</sup>

*Time of appealing.*—The act provides that appeals shall be taken within twenty days from the decree of distribution.<sup>10</sup> And if not taken within that time the court may order the money to be paid according to the decree.<sup>11</sup> The twenty days begin to run from the entry of the decree, though entered in vacation; notice having been given to the counsel of the party, which notice may be by parol, and need not be in writing.<sup>12</sup>

Where the statute requires appeals, from confirmation of the report of an auditor upon an assignee’s account, to be taken within one year from such confirmation, a party cannot, after the expiration of that period, bring up the question by a petition to the court below to take off the confirmation, and, on their refusal, appealing to the Supreme Court; such refusal is not a definitive decree from which an appeal lies to the Supreme Court.<sup>13</sup> But if the court

<sup>1</sup> Cash’s Appeal, 1 Barr 166. There was a previous *dictum* to the contrary in Boal’s Appeal, 2 Rawle 37.

<sup>2</sup> Sect. 89, Purd. Dig. 447, pl. 108, Pamph. L. 777.

<sup>3</sup> Smith v. Reiff, 8 Harris 364.

<sup>4</sup> Towers v. Tuscarora Academy, 8 Barr 297.

<sup>5</sup> Hamner v. Griffith’s Administrator, 1 Grant 193.

<sup>6</sup> Reamer’s Appeal, 6 Harris 510;

McLellan’s Appeal, 2 Casey 463.

<sup>7</sup> Constine’s Appeal, 1 Grant 242.

<sup>8</sup> Hise’s Estate, 5 Watts 157.

<sup>9</sup> Allegheny Bank’s Appeal, 12 Wright 328.

<sup>10</sup> Sect. 89, Purd. Dig. 447, pl. 108, Pamph. L. 777.

<sup>11</sup> Sect. 90.

<sup>12</sup> Dawson’s Appeal, 3 Harris 480.

<sup>13</sup> Keim’s Appeal, 3 Casey 42.

below, in a case of mistake, choose to open the decree, and grant relief, upon application made soon after the expiration of the period allowed for appeal, it is not error.<sup>1</sup>

*Manner of taking the appeal.*—The party appealing must make oath or affirmation that his appeal is not intended for delay, and in order to make it a *supersedeas* he must also give security by recognisance with sufficient surety, in the court below or before one of the judges thereof, to prosecute his appeal with effect and pay all costs adjudged against him.<sup>2</sup> Pending the appeal, the court below may order the fund to be invested, or to be distributed according to the decree, taking security from the distributees to refund the amount with interest in case the decree is reversed or altered,<sup>3</sup> as in the case of a writ of error.<sup>4</sup>

*Grounds.*—The Supreme Court inquires only into errors actually committed by the court below, and does not look at the auditor's report but for the purpose of ascertaining what exceptions were taken to it below, and how they were decided: no new matter can be assigned for error in the Supreme Court, otherwise they might reverse the court below for matter never decided by them: the errors assigned should distinctly allege error in the court below in deciding upon certain specified exceptions taken to the report.<sup>5</sup> Under the Act of 29th March 1832,<sup>6</sup> the Supreme Court acts as an appellate court strictly, and will not reverse a decree of the Orphans' Court but on exceptions taken in the court below.<sup>7</sup> But under the Act of 14th April 1835,<sup>8</sup> if it be apparent that injustice has been done to the appellant, the court has a discretionary power to hear and determine such appeals according to the right and justice of the case.<sup>9</sup>

Each assignment of error must be specified particularly, and by itself; and errors not so assigned are considered as waived.<sup>10</sup> An assignment that "the court erred in confirming the report of the auditor," was not sufficient to indicate the point intended to be raised.<sup>11</sup> Where facts have been found by the auditor and approved by the court below, the case must manifest most flagrant error, in order to justify the Supreme Court in interfering with the report.<sup>12</sup> In such case the burden of proof is on the appellant.<sup>13</sup> The auditor's report has the weight of a verdict, or an award under the Act of 1705, and is entitled to every presumption in its favor, and will not be

<sup>1</sup> Beek's Appeal, 3 Harris 406.

<sup>2</sup> Act 16th June 1836, § 91, *Purd.* Dig. 447, pl. 110, *Pamph. L.* 777.

<sup>3</sup> *Ibid.*, § 92. For the form of a bond in such case see *Smith's Forms* 386, pl. 36.

<sup>4</sup> *Ante*, p. 1086.

<sup>5</sup> *Mengas's Appeal*, 7 Harris 221.

<sup>6</sup> *Pamph. L.* 190 *et seq.*; *Purd. Dig.*, tit. "Orphans' Court."

<sup>7</sup> *Irwin's Appeal*, 5 *Whart.* 577; *Hise's Estate*, 5 *Watts* 157.

<sup>8</sup> *Purd. Dig.* 769, pl. 50.

<sup>9</sup> *Hise's Estate*, 5 *Watts* 157.

<sup>10</sup> *Bull's Appeal*, 12 Harris 286.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Mengas's Appeal*, 7 Harris 221; *Ake's Appeal*, 9 Harris 321; *Loomis's Appeal*, 10 Harris 312; *Quain's Appeal*, 10 Harris 513; *Whiteside's Appeal*, 11 Harris 114; *Bull's Appeal*, 12 Harris 286; *Burroughs's Appeal*, 2 *Casey* 264; *Miller's Appeal*, 6 *Casey* 478; *Mellon's Appeal*, 8 *Casey* 121; *Landis v. Scott*, 8 *Casey* 495; *White's Appeal*, 12 *Casey* 134; *Robinett's Appeal*, 12 *Casey* 174; *Chew's Appeal*, 9 *Wright* 228; *Hahnlin's Appeal*, 9 *Wright* 343.

<sup>13</sup> *Mellon's Appeal*, 8 *Casey* 121.

set aside on a question of fact, except on grounds which would justify the grant of a new trial in a court of common law; it should be manifestly against the evidence.<sup>1</sup> But a second report to the same effect places the question of fact upon grounds too substantial to be easily overthrown.<sup>2</sup>

And where the court below reversed the auditor's report on a matter of fact, the Supreme Court, though entertaining grave doubts, confirmed the decree.<sup>3</sup>

Where it does not appear from the record whether the auditor was sworn or not, after the confirmation of the report by the court below it will be presumed by the Supreme Court that he was qualified, or that it was waived at the hearing.<sup>4</sup> An exception on the ground that the court below had no right to appoint an auditor and decree distribution when there was no fund in court, is too late, after final decree in the court below, and cannot be taken in the Supreme Court on appeal.<sup>5</sup> It is error to appropriate the proceeds to a void judgment.<sup>6</sup> After a petition to the court to award an issue, or to appoint auditors to investigate the facts, the course of the court, in taking the latter alternative and not the former, cannot afterwards be complained of as error.<sup>7</sup>

When facts have been decided by the court below, or ascertained by a feigned issue, there must appear to have been gross error on the part of the court in order to induce the Supreme Court to reverse, refer the matter to a master, or direct an issue.<sup>8</sup>

*Effect of appeal upon the distributees.*—Where the sale was upon a judgment confessed to secure the endorser of a promissory note drawn by defendant, and the appropriation of the proceeds, directed to be made to the judgment, was delayed for several years by an appeal to the Supreme Court, the interest on the amount appropriated did not cease to run at the date of the sale, but continued in favor of the endorser till actual payment.<sup>9</sup>

*Of purchasers.*—The purchaser having paid the money<sup>10</sup> and received his deed, is in a position to demand possession of the land. But before explaining the mode in which he may enforce this demand in case it should be resisted, we shall briefly as possible show what rights he has acquired by his purchase. This subject has already been partially discussed.<sup>11</sup>

1. *The purchaser's title.*—Where the judgment is valid and the proceedings are regular, is at least as extensive as that of the defendant in the judgment.<sup>12</sup> And where a public charity is created subject to a

<sup>1</sup> Harland's Accounts, 5 Rawle 330; Stehman's Appeal, 5 Barr 413; Riddle's Estate, 7 Harris 431; Harris's Appeal, 2 Grant 305.

<sup>2</sup> Riddle's Appeal, 7 Harris 431.

<sup>3</sup> Quain's Appeal, 10 Harris 510.

<sup>4</sup> Bull's Appeal, 12 Harris 286.

<sup>5</sup> Constine's Appeal, 1 Grant 242.

<sup>6</sup> Curry's Appeal, 3 Casey 194.

<sup>7</sup> Dickerson's Appeal, 7 Barr 257.

<sup>8</sup> Piper's Appeal, 8 Harris 67; Harding's Estate, 12 Harris 189; Bolton's Appeal, 3 Grant 205.

<sup>9</sup> Baker v. Exchange Bank, 12 Harris 391.

<sup>10</sup> He acquires no title until he has paid the purchase-money, though he has obtained an order that the deed, which was delivered to the prothonotary as an escrow until payment of the purchase-money, shall be delivered to him: Robins v. Bellas, 3 Watts 359. See Hartman v. Stahl, 2 Pa. R. 231.

<sup>11</sup> See *ante*, 1037 *et seq.*

<sup>12</sup> Act 16th June 1836, § 66, Purd. Dig. 443, pl. 78, Pamph. L. 773; Coul-

charge, which afterwards takes the form of a mortgage, a sheriff's sale under such mortgage will vest a valid title in the purchaser as against the public.<sup>1</sup> If the defendant have no interest in the land, either at the entry of the judgment, or at the time of the sheriff's sale, the purchaser takes none.<sup>2</sup> But it would not be correct to say that the purchaser has no better title than the defendant had at the time of the sale; his title dates in many respects from the lien of the judgment or mortgage; and he holds the land discharged of secret trusts, and of intervening encumbrances, leases, and conveyances made by the debtor: if it were not so the debtor might dispose of his land, and thus defeat the judgment-creditors: whereas the general rule is, that the sale on the judgment overreaches the *incumbe* acts of the debtor, and passes the title discharged of them.<sup>3</sup> But the purchaser of the legal title is not even affected by secret trusts and unrecorded conveyances or encumbrances prior to his purchase, or to his judgment, of which he had no notice;<sup>4</sup> and he is protected by the recording acts against secret defects in a title apparently good.<sup>5</sup> And this raises the question, what is sufficient notice to the purchaser of a defect in or an encumbrance upon his title.

*Notice to affect the purchaser.*—*The record of a deed or mortgage is constructive notice to all mankind.*<sup>6</sup> A purchaser is bound, therefore, to look to the records and the state of the possession at the time of the sale;<sup>7</sup> but not to its state at the date, or the acknowledgment, of the sheriff's deed.<sup>8</sup> And, where a trust was only mentioned in the recital of the deed, it is no notice to the purchaser at a sheriff's sale of the land on a judgment against the grantee.<sup>9</sup> So, where the description in a recorded deed is too vague and indefinite either to bring home notice to the purchaser, or to put

ter v. Phillips, 8 Harris 154. See Shearer v. Woodburn, 10 Barr 511. Want of service of a *scire facias* to revive the judgment, upon a vendee under articles not recorded, was not material to the revival, and by the levy and sale under the revived judgment, the title passed with the same effect as though the purchaser had bought from the defendant and original owner. Without notice of the title of the vendee, the purchaser is protected by the recording acts: Meehan v. Williams, 12 Wright 238.

<sup>1</sup> City of Phila. v. Bicknell, 11 Casey 123.

<sup>2</sup> See Lapsley v. Lapsley, 9 Barr 130; Smith v. Steele, 5 Harris 30; Spear v. Allison, 8 Harris 200; Phillips v. Improvement Co., 1 Casey 56; Rafensberger v. Cullison, 4 Casey 426; Zimmerman v. Wengert, 7 Casey 401; Hunter v. Hulings, 1 Wright 307; Churcher v. Guernsey, 3 Wright 84.

<sup>3</sup> See Lenox v. McCall, 3 S. & R.

97; McCormick v. McMurtrie, 4 Watts 195; Bury v. Sieber, 5 Barr 434. Coulter v. Philips, 8 Harris 154.

<sup>4</sup> See Smith v. Painter, 5 S. & R. 225; Swartz v. Moore, 5 S. & R. 257; Anon., S. Ct., 1 Sm. Laws 68; Lazarus v. Bryson, 3 Binn. 59; Clark v. Campbell, 2 Rawle 215; Salter v. Reed, 3 Harris 260; Stewart v. Freeman, 10 Harris 120; Kaine v. Denniston, 10 Harris 202; Fillman v. Divers, 7 Casey 429; Hibberd v. Bovier, 1 Grant 266; Boynton v. Winslow, 1 Wright 315; Rhines v. Baird, 5 Wright 256; Meehan v. Williams, 12 Wright 238.

<sup>5</sup> See Hiester v. Fortner, 2 Binn. 40; Morrison v. Funk, 11 Harris 421; Banks v. Ammon, 3 Casey 172.

<sup>6</sup> Evans v. Jones, 1 Yeates 173.

<sup>7</sup> Stewart v. Freeman, 10 Harris 120; Gingrich v. Foltz, 7 Harris 38.

<sup>8</sup> Stewart v. Freeman, 10 Harris 120; Gibson v. Winslow, 2 Wright 49.

<sup>9</sup> Kaine v. Denniston, 10 Harris 202.

him upon inquiry, he will be protected against it.<sup>1</sup> And the purchaser is not bound to notice a deed or mortgage defectively registered, nor a judgment or lien which appears on its face to be a nullity.<sup>2</sup> He is not bound to look beyond the judgment-docket.<sup>3</sup> And where a judgment existed unsatisfied of record, which, if valid, would have the effect of causing a mortgage to be discharged by the sheriff's sale, the purchaser will not be affected by the fact that such judgment had been paid, unless actual notice to him of such payment is shown.<sup>4</sup> But, though a purchaser is in general protected by the recording acts against an outstanding title of which he has neither actual nor constructive notice, this does not apply as against the holder of the legal title of land to which the defendant had only the equitable title under articles: the possession of the defendant in such case is notice of his equitable title only, and such title only passes by the sale: the admissions of the defendant, made before the entry of the judgment, that the purchase-money was unpaid, are admissible in evidence against the purchaser at the sheriff's sale.<sup>5</sup>

*Lis pendens*.—The pendency of proceedings at law is constructive notice to purchasers. Therefore, one who purchases pending an ejectment, to which the owner of the interest sold is a party, is affected with notice, and is bound by the decree as much as if he were a party to the ejectment.<sup>6</sup> So a sheriff's sale is constructive notice, and one who purchases at a second sheriff's sale of the same interest, made before the sheriff's deed in the first sale is acknowledged, takes no title where the first sale was valid, although the deed for the last sale was first acknowledged.<sup>7</sup> But an irregular proceeding does not affect a subsequent purchaser.<sup>8</sup> So, where a sale of land was fraudulent under the Statutes 13 and 27 Eliz., the grantor remaining in possession by his tenants, and during that possession, the land was sold by the sheriff as the property of the grantee, such possession of the grantor was constructive notice to the sheriff's vendee of the fraudulency of the conveyance from the grantor to the grantee.<sup>9</sup>

*Actual notice* of an adverse title will generally conclude a purchaser at sheriff's sale, and he will then stand in the same situation as the defendant.<sup>10</sup> And it is sufficient that notice of an adverse title be given at the sale;<sup>11</sup> but notice communicated to the sheriff,

<sup>1</sup> Banks v. Ammon, 3 Casey 172.

<sup>2</sup> Goepp v. Gartiser, 11 Casey 130.

<sup>3</sup> Hance's Appeal, 1 Barr 408; Commonwealth's Appeal, 4 Barr 165.

<sup>4</sup> Magaw v. Garrett, 1 Casey 319.

<sup>5</sup> Morrison v. Funk, 11 Harris 421. This case is not really an exception to the rule as given above, for here the defendant's possession was *constructive* notice of an outstanding legal title. A purchaser of the equitable title, with notice of the outstanding legal title, cannot set up an outstanding equity against the legal title: Dougan v. Blocher, 12 Harris 28.

<sup>6</sup> Hersey v. Turbett, 3 Casey 418.

And see Storch v. Carr, 4 Casey 135.

<sup>7</sup> Hoyt v. Koons, 7 Harris 277. And see McFee v. Harris, 1 Casey 102.

<sup>8</sup> See Galbraith v. Fisher, 10 Harris 406.

<sup>9</sup> Hood v. Fahnestock, 1 Barr 470.

<sup>10</sup> See Eschbach v. Zimmerman, 2 Barr 313; Brown v. Bank of Chambersburg, 3 Barr 187; Moyer v. Schick, 3 Barr 242; Keeler v. Vantuyke, 6 Barr 250; Stradling v. Henck, D. C. Phila., 2 Phila. 302; Coleman v. Lewis, 3 Casey 291; Patton v. Hollidaysburg, 4 Wright 206.

<sup>11</sup> Barnes v. McClinton, 3 Pa. R. 67; Weeks v. Haas, 3 W. & S. 525; Esch-

not publicly announced to the bidders, will not affect the purchaser: the sheriff is not his agent:<sup>1</sup> and the adverse claimant will, as against the purchaser at the sale, be restricted to the particular title of which notice was given.<sup>2</sup> Statements or loose conversations made at the sale by strangers will not affect the purchaser.<sup>3</sup> Actual notice may be inferred from circumstances, and is then a question for the jury.<sup>4</sup> As regards encumbrances the rule seems to be different, and it has been said that the purchaser is protected against an unrecorded mortgage, prior to the judgment under which the sale was made, whether he have notice of it or not.<sup>5</sup> At any rate, the judgment-plaintiff purchasing at the sale is not affected by notice, *given at the sale*, of an unrecorded mortgage prior to his judgment;<sup>6</sup> but if he had actual notice of the mortgage at the time of the execution of his warrant of attorney, he takes subject thereto.<sup>7</sup> And a mortgagee in possession under an unrecorded mortgage, has no right to retain the possession until he has been repaid his mortgage-debt, as against the sheriff's vendee under a judgment against the mortgagor.<sup>8</sup>

It has been said that the purchaser of an equitable title is in all cases bound by equities of which he had no notice;<sup>9</sup> but it seems there are exceptions to this rule.<sup>10</sup>

Judgment-creditors of a trustee are not in the position of purchasers without notice, and cannot hold against the *cestui que trust*: that the trustee was insolvent at the time the trust was created, does not disqualify him: nor is that fact any evidence that the trust was but a cover to defraud his creditors.<sup>11</sup>

The effect of notice given at the sale has been already explained.<sup>12</sup>

*Constructive notice* of an adverse title will affect the purchaser. Such is the case of a conveyance where the grantor retained possession, which was fraudulent under the Statutes of Elizabeth, and it was held that the possession of the grantor by his tenants was constructive notice to a purchaser under judgment against the grantee, that the transfer to the grantee was fraudulent.<sup>13</sup> Possession or occupancy, to be constructive notice, must be clear, open, notorious, and unequivocal, at the time of the purchase: mere occasional entries upon unimproved land, as for the purpose of mining coal, are not sufficient.<sup>14</sup>

bach v. Zimmerman, 2 Barr 313; Brown v. Bank of Chambersburg, 3 Barr 187; Moyer v. Schick, 3 Barr 242. It is not necessary to charge the purchaser with notice at the date of the judgment: *Ibid*.

<sup>1</sup> Stahle v. Spohn, 8 S. & R. 327, per DUNCAN, J.

<sup>2</sup> Eschbach v. Zimmerman, 2 Barr 313; Brown v. Bank of Chambersburg, 3 Barr 187; Randall v. Silverthorn, 4 Barr 177.

<sup>3</sup> Drexel v. Man, 6 W. & S. 343; Fickes v. Ersick, 2 Rawle 166; Sergeant v. Ford, 2 W. & S. 126; Loomis's Appeal, 10 Harris 312.

<sup>4</sup> Brown v. Bank of Chambersburg, 3 Barr 187; Rhines v. Baird, 5 Wright 256.

<sup>5</sup> Hibberd v. Bovier, 1 Grant 266. See however, Britton's Appeal, 9 Wright, 172, and the discussion of the cases in the opinion of the court per STRONG, J.

<sup>6</sup> Stradling v. Henck, D. C. Phila., 2 Phila. Rep. 302.

<sup>7</sup> *Ibid*.

<sup>8</sup> Wilson v. Shoenberger's Executors, 10 Casey 121.

<sup>9</sup> Chew v. Barnet, 11 S. & R. 389; Reed v. Dickey, 2 Watts 459; Kramer v. Arthurs, 7 Barr 165.

<sup>10</sup> Bellas v. McCarty, 10 Watts 13; Rhines v. Baird, 5 Wright 256.

<sup>11</sup> Shryock v. Waggoner, 4 Casey 430.

<sup>12</sup> See *ante* "Sheriff's Sale," p. 1004.

<sup>13</sup> Hood v. Fahnestock, 1 Barr 470.

<sup>14</sup> Meehan v. Williams, 12 Wright 238.

On the other hand, fourteen years' possession by the grantee, under an unrecorded deed, of a piece of meadow planted with willows which were cut annually for the purpose of basket-making, was held to give notice to the purchaser at sheriff's sale under a judgment against the grantor.<sup>1</sup>

*Effect of irregularities in obtaining the judgment, or in the proceedings under it.*—In general it may be said that the purchaser's title is not affected by the invalidity of the judgment upon which the sale was made, or even by its reversal, unless it was absolutely void from the beginning.<sup>2</sup> Thus a sale under a judgment against Ephraim Jackson's executors, without naming them, is valid.<sup>3</sup> And even if the judgment was confessed by an attorney without authority, the purchaser acquires a good title by a sale under it;<sup>4</sup> although the judgment was irregularly revived.<sup>5</sup> So if the judgment had been paid, but not satisfied of record till after the sale, though this was done before the acknowledgment of the sheriff's deed, the purchaser's title is good, unless the plaintiff becomes purchaser.<sup>6</sup> But where defendant had aliened his land and the lien of the judgment expired between the levy and sale, the purchaser takes no title.<sup>7</sup> If process be issued at so late a day that execution cannot be had before the expiration of the lien, it ought to be accompanied by a *scire facias* which will have the effect of preserving the lien.<sup>8</sup> The title of a purchaser, other than the plaintiff, cannot be affected by an irregularity in the proceedings of which he had no notice.<sup>9</sup> This has since been qualified, and it is now held that in case of an error in the proceedings, the plaintiff purchasing at the sale is as much protected by the Act of 1705 as a stranger would be.<sup>10</sup>

Mere irregularities in obtaining the judgment, or in the course of the execution, are sometimes cured.<sup>11</sup> If the party contesting the judgment was present at the sale and induced others to purchase;<sup>12</sup> or participated in the disposition of the proceeds;<sup>13</sup> or stood by when valuable improvements were made by the purchaser, and gave no notice of his claim,<sup>14</sup> he is estopped thereby. But where the real estate of a lunatic was illegally sold by the sheriff, the receipt of proceeds by his committee will not estop a future committee from

<sup>1</sup> *Krider v. Lafferty*, 1 Whart. 303.

<sup>2</sup> Act of 1705, § 9, 1 Sm. Laws 61, *Purd. Dig.* 443, pl. 80; *Burd v. Dansdale*, 2 Binn. 80; *Feger v. Kroh*, 6 Watts 294; *Same v. Keefer*, 6 Watts 297; *Overton v. Tozer*, 7 Watts 331; *Bowen v. Bowen*, 6 W. & S. 504; *Cooper v. Borrall*, 10 Barr 491; *Gibson v. Winalow*, 2 Wright 49.

<sup>3</sup> *Jones v. Gardner*, 4 Watts 416.

<sup>4</sup> *Fetterman v. Murphy*, 4 Watts 424; *Beeson v. Beeson*, 9 Barr 289; *Hinds v. Scott*, 1 Jones 24; *Irwin v. Nixon*, 1 Jones 419; *Evans v. Meylert*, 7 Harris 402. The judgment cannot be impeached collaterally, and the only remedy for the injured party is by action against the attorney: *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Samms v. Alexander*, 3 Yeates 268; *Gibson v. Winslow*, 2 Wright 49. As to the effect on plaintiff purchasing, see *Arnold v. Gorr*, 1 Rawle 227, *SMITH, J.*

<sup>7</sup> *Gloninger v. Hazard*, C. P. Phila., 4 Phila. Rep. 354.

<sup>8</sup> *Davis v. Ehrman*, 8 Harris 256.

<sup>9</sup> *Stahle v. Spohn*, 8 S. & R. 327. But this has since been qualified.

<sup>10</sup> *Arnold v. Gorr*, 1 Rawle 223.

<sup>11</sup> *Burdick v. Norris*, 2 Watts 28.

<sup>12</sup> *Willing v. Brown*, 7 S. & R. 467, *Bixler v. Gilleland*, 4 Barr 156; *Spragg v. Shriver*, 1 Casey 282.

<sup>13</sup> *Hamilton v. Hamilton*, 4 Barr 193; *Crowell v. Meconkey*, 5 Barr 168; *Spragg v. Shriver*, 1 Casey 282.

<sup>14</sup> *Hamilton v. Hamilton*, 4 Barr 193.

recovering possession, even though valuable improvements were made by the purchaser.<sup>1</sup> And a sheriff's sale made after the discharge of defendant as a bankrupt, conveys no title even as against one claiming under a fraudulent deed made by defendant in contemplation of bankruptcy.<sup>2</sup> If judgment against executors for a legacy charged on land be entered against the land of certain only of the devisees, the land of another devisee will not pass by the sheriff's sale.<sup>3</sup>

Where judgment upon a mortgage was irregular, the sheriff's vendee, before he can be dispossessed by the mortgagor, is entitled to repayment of so much of the proceeds as had been applied to the mortgage.<sup>4</sup>

Irregularities in the course of the execution are generally cured by the acknowledgment of the sheriff's deed.<sup>5</sup> Thus the issue of two writs of *vend. exp.* to the same term, where one inquisition was set aside and a new one held;<sup>6</sup> a sale without condemnation or waiver of inquisition;<sup>7</sup> or the omission to return the *vend. exp.*;<sup>8</sup> or a sale under a *fi. fa.* and *vend. exp.* issued after defendant's death;<sup>9</sup> or a sale under an *alias lev. fa.* which contained no description of the property,<sup>10</sup> will not affect the purchaser's title. And it is no objection to the purchaser's title, that one of the defendants was a surety and the principal had personal property which was not levied on.<sup>11</sup> Where the description in the levy is so defective that the sale conveys no title for a part of the land, a subsequent conveyance by defendant to purchaser will give him title to the whole tract.<sup>12</sup> But a sale of a life estate under a *venditioni*, which was issued without the order of the court, and without due notice to the tenant for life, is void and confers no title on the purchaser.<sup>13</sup>

A sale of decedent's land upon execution issued without warning his administrators, is invalid.<sup>14</sup> And a sale made after the return day of the *fi. fa.*, with the defendant's consent, is void as against a purchaser at a subsequent sale under an encumbrance which would have been discharged had the first sale been valid.<sup>15</sup> So a sale after waiver of inquisition by a defendant who had parted with his interest, is void and will confer no title; and the irregularity is not cured by a previous condemnation under a writ against a stranger to defendant's title.<sup>16</sup> Where by mistake the land of the plaintiff was included in the levy and sold with the defendant's land, the purchaser acquired no title thereto.<sup>17</sup>

<sup>1</sup> Warden v. Eichbaum, 2 Harris 121.

<sup>2</sup> King v. Deets, 2 Am. L. J. 263.

<sup>3</sup> Lapsley v. Lapsley, 9 Barr 130.

<sup>4</sup> Evans v. Meylert, 7 Harris 402.

<sup>5</sup> See ante, p. 1027. Stackpole v. Glassford, 16 S. & R. 163; Springer v. Brown, 9 Barr 305.

<sup>6</sup> Springer v. Brown, 9 Barr 305.

<sup>7</sup> Spragg v. Shriver, 1 Casey 282.

<sup>8</sup> Gibson v. Winslow, 2 Wright 49.

<sup>9</sup> Springer v. Brown, 1 Am. L. J. 280. In this case the deceased defendant was but a surety, and the surviving principal was solvent.

<sup>10</sup> Dalzell v. Crawford, 2 P. L. J. 23. This defect was amendable by the *sci. fa.* and the *levari*: Ibid.

<sup>11</sup> Springer v. Brown, 9 Barr 305.

<sup>12</sup> Iddings v. Cairns, 2 Grant 89.

<sup>13</sup> Kintz v. Long, 6 Casey 501. See post, Sect. VI., "Levy on Life Estate."

<sup>14</sup> Cadmus v. Jackson, S. Ct., 23 Leg. Int. 196. See Act 24th February 1834, § 33, Purd. Dig. 238, pl. 99, Pamph. L. 79.

<sup>15</sup> Dale v. Medcalf, 9 Barr 108.

<sup>16</sup> Wolf v. Payne, 11 Casey 97.

<sup>17</sup> Hunter v. Hulings, 1 Wright 307.



A fraudulent vendee gains no title to the land by a sheriff's sale, although an innocent creditor may receive the proceeds in payment of a judgment.<sup>1</sup> If the purchaser at the sale gets the property at an under price by a trick or fraudulent pretence, as by falsely giving out that he was buying it for the family of the defendant, and by fraudulently pretending that the sale would be subject to certain liens which he knew would be divested by it, his title is invalid.<sup>2</sup> But to avoid such title the fraudulent intent must have been successful.<sup>3</sup> And declarations of third parties, since deceased, that they would have bid more than the land brought had they not been prevented by the declarations of the purchaser, that if he got it he would let the defendant have it upon being repaid his money, are not competent testimony.<sup>4</sup>

When the purchaser has been guilty of actual fraud he is not entitled to be repaid his money.<sup>5</sup>

A sheriff's sale to the administrator of defendant, who paid no money but purchased in trust for the creditors and heirs, is fraudulent as to creditors.<sup>6</sup>

Where a deputy sheriff became the purchaser, and there was no fraud, the purchase is voidable but not void, and the title is good until set aside by the court, which will only be done upon the purchaser being reimbursed the money paid.<sup>7</sup>

A sale under authority of a foreign judgment, the parties not having appeared before the court, passes no title.<sup>8</sup> So a sale under a judgment on a mortgage, the action on which was brought in a county where the land does not lie, passes no title.<sup>9</sup>

*Sale under a void judgment.*—We have seen that if the judgment is absolutely void, the sale thereunder confers no title. Such is a judgment confessed under a bond and warrant given by a married woman and her husband, and a sale of her property under such judgment during the coverture, confers no title.<sup>10</sup> The bond of a married woman is absolutely void, and so is any judgment on it, whether by confession or otherwise;<sup>11</sup> even if given for necessities for her family,<sup>12</sup> or ante-nuptial debts,<sup>13</sup> and even where she has obtained the consideration by falsely representing herself to be unmarried.<sup>14</sup>

Where the land was sold by the sheriff in the lifetime of the ground-tenant, and in his name, the subsequent confession of judg-

<sup>1</sup> Foulk v. McFarlane, 1 W. & S. 299.

<sup>2</sup> Gilbert v. Hoffman, 2 Watts 66; McCaskey v. Graff, 11 Harris 321; Abbey v. Dewey, 1 Casey 413; Hogg v. Wilkins, 1 Grant 68.

<sup>3</sup> Abbey v. Dewey, 1 Casey 413.

<sup>4</sup> Hogg v. Wilkins, 1 Grant 68.

<sup>5</sup> Gilbert v. Hoffman, 2 Watts 66; McCaskey v. Graff, 11 Harris 321.

<sup>6</sup> Hays v. Heidelberg, 9 Barr 203.

<sup>7</sup> Jackson v. McGinness, 2 Harris 331.

<sup>8</sup> Magill v. Brown, Bright. R. 346 note, BALDWIN, J.

<sup>9</sup> Menges v. Oyster, 4 W. & S. 20; Treaster v. Fleisher, 7 W. & S. 137.

<sup>10</sup> Caldwell v. Walters, 6 Harris 79. And vendee of the purchaser is in no better condition than the purchaser himself: Ibid.

<sup>11</sup> Steinman v. Ewing, 7 Wright 63.

<sup>12</sup> Glyde v. Kiester, 8 Casey 85; Keiper v. Helfrick, 6 Wright 325.

<sup>13</sup> Ibid.

<sup>14</sup> Keen v. Coleman, 3 Wright 299. But her mortgage for purchase-money of her land, though void in law, may be enforced in equity: Glass v. Warwick, 4 Wright 140.

ment by his administrator for arrears of ground-rent, for a period of years extending back far beyond the sheriff's sale, and a sale on such judgment, with notice, given at the sale, of the claim of the former purchaser, the latter not being a party to the judgment, and no notice of the proceedings being given him, will not affect his title.<sup>1</sup>

Fraud in the judgment renders it void, and a sale under it to the plaintiff will confer no title upon the purchaser,<sup>2</sup> but if the purchaser is a stranger the rule is otherwise.<sup>3</sup> But where the plaintiff, in a judgment confessed by an insolvent debtor, purchases at the sale, the presumption of law is in favor of the fairness of the transaction if the judgment itself is a fair one, but the burden of showing this is upon the creditor purchaser.<sup>4</sup> And the title of plaintiff purchasing at the sheriff's sale is not affected by the fact that the judgment had been confessed by the defendant in contemplation of applying for the benefit of the Bankrupt Law of 1841, for the purpose of giving the plaintiff a preference over the general creditors, the plaintiff not being in any way a party to such fraudulent purpose: though the judgment would be avoidable in the proper bankrupt court, it cannot be controverted or set aside out of it, for the act in declaring preferences void merely prescribes a rule for administering the estate in the bankrupt court, but does not define the parties' rights outside of it.<sup>5</sup> The order of the Common Pleas to credit to plaintiff's judgment the amount of his bid at the sheriff's sale is not conclusive evidence of the fairness of the judgment; even if the sale was under a prior valid judgment, if the purchaser's judgment were fraudulent, the order of appropriation would not protect the plaintiff therein, and the deed of the sheriff conveyed him no title.<sup>6</sup>

An Act of Assembly making valid a sheriff's sale which had been decided by the Supreme Court to pass no title, is unconstitutional and void.<sup>7</sup>

*Sale under an expired judgment.*—The purchaser can be implicated in the consequences of the lien having expired only in a controversy with a purchaser from the debtor by conveyance previous to the levy; in a controversy between judgment-debtors he cannot be implicated at all.<sup>8</sup> Where the plaintiff becomes the owner of the land upon which his judgment is a lien, the lien is extinguished by operation of law, and no subsequent sale by the sheriff on that judgment will pass the title.<sup>9</sup>

A sale under a satisfied judgment to the plaintiff is void.<sup>10</sup> So if the purchaser knew that the debt had been paid he gets no title.<sup>11</sup> But his *bonâ fide* vendee for a valuable consideration, without notice, will be protected.<sup>12</sup>

<sup>1</sup> *Salter v. Reed*, 3 Harris 260.

<sup>2</sup> *Hall v. Hamlin*, 2 Watts 354. But see *Heller v. Jones*, 4 Binn. 61.

<sup>3</sup> *Martin v. Gernandt*, 7 Harris 128, 129, Gibson, J.

<sup>4</sup> *Brandt v. Stevenson*, D. C. Phila., 3 Phila. Rep. 205.

<sup>5</sup> *Fenlon v. Lonerger*, 5 Casey 471.

<sup>6</sup> *Martin v. Gernandt*, 7 Harris 124.

<sup>7</sup> *Menges v. Dentler*, 9 Casey 495.

<sup>8</sup> *Chahoon v. Hollenback*, 16 S. & R.

425.

<sup>9</sup> *Koons v. Hartman*, 7 Watts 23. The *terre-tenant* need take no steps to have such sale set aside: he can defend himself in ejectment: *Ibid*.

<sup>10</sup> *Hoffman v. Strohecker*, 7 Watts 86; *Gibbs v. Neely*, *Ibid*. 305.

<sup>11</sup> *Hoffman v. Strohecker*, 7 Watts 86.

<sup>12</sup> *Ibid*.; s. c., 9 Watts 183. See *Samms v. Alexander*, 3 Yeates 268; *Arnold v. Gorr*, 1 Rawle 223.

*The quantity of land which passes to the purchaser at a sheriff's sale is to be ascertained by the return to the levy, which, in the absence of reasonable doubt, is to be construed by the court alone; but where by reason of uncertainty or looseness of description, evidence aliunde is resorted to, to ascertain the quantity and define the boundaries of the land included in the levy, the whole of the evidence is to be referred to the jury.*<sup>1</sup> Though a less estate may pass under a misdescription in the levy, a greater cannot.<sup>2</sup> But after acknowledgment of the deed, the defendant cannot have the sale set aside on the ground that part of the land sold was not included in the levy, though he tender the costs. Where the defendant represented that certain land was included in the levy, such land in equity passes to an innocent purchaser.<sup>3</sup> Where the defendant was the owner of part of a tract, and of a ground-rent reserved out of another part, and the levy was made on the whole tract with the *rents, issues, and profits* thereof, the ground-rent passed under the word *rents*; and this though the advertisements described the land only, for defective description therein can have no effect after the deed is acknowledged.<sup>4</sup> A sheriff's sale of A. with its appurtenances passes the defendant's title in B., which he had held by adverse possession short of twenty-one years, and used in connection with A. as one farm, B. having been formerly the site of a mill-pond appurtenant to a mill on A., but that right having ceased under the provisions of the grant by disuser.<sup>5</sup>

Where the owner of land has annexed an easement to it, and then the land is sold by the sheriff, the easement passes as appurtenant, though not distinctly levied on.<sup>6</sup> An easement for the benefit of an adjoining tract is not merged by the ownership of the two tracts becoming vested in the same person, and if the owner has always recognised the existing easement, it will pass by a sheriff's sale which has the effect of severing the ownership of the two tracts.<sup>7</sup>

If the sheriff's deed by mistake called for the land of a stranger as adjoining in a particular direction, the latter would not be bound by the error, and consequently those who claim under him have no right to insist upon it as precluding the sheriff's vendee by estoppel from showing the truth.<sup>8</sup> Where A., the owner of a tract, agreed to convey part of it to B. upon certain conditions which were performed by B., and afterwards, under a judgment obtained by A. against B., the whole tract was levied on and sold, it was held that A. was bound by the levy and sale, and his title passed to the sheriff's vendee.<sup>9</sup>

*Fixtures.*—The machinery of a manufactory passes with the freehold to the purchaser at sheriff's sale.<sup>10</sup> But rolls delivered at a

<sup>1</sup> Hoffman v. Danner, 2 Harris 25. See ante, p. 976 et seq.

<sup>2</sup> McLaughlin v. Shields, 2 Jones 287, per ROGERS, J.

<sup>3</sup> Buchanan v. Moore, 13 S. & R. 304.

<sup>4</sup> Heartley v. Beaum, 2 Barr 165.

<sup>5</sup> Scheetz v. Fitzwater, 5 Barr 126.

<sup>6</sup> Swartz v. Swartz, 4 Barr 353; Murphy v. Campbell, Ibid. 485; Cope v. Grant, 7 Ibid. 488.

<sup>7</sup> Worne v. Marsh, C. P. Phila., 22 Leg. Int. 182.

<sup>8</sup> Cramer v. Carlisle Bank, 2 Grant 267.

<sup>9</sup> Kirkpatrick v. Black, 10 Watts 329. But see Hunter v. Hulings, 1 Wright 307.

<sup>10</sup> Overton v. Williston, S. Ct., 15 Leg. Int. 157.

rolling-mill, where they remained a long time, without being turned or finished off, or put into the mill, do not pass to the purchaser of the realty.<sup>1</sup> The fragments of a building blown down by a tempest, are not thereby converted into personalty, but pass to the purchaser of the realty at sheriff's sale.<sup>2</sup> A fixture annexed to the freehold at the date of the judgment, afterwards temporarily detached and sold to a stranger, but not delivered, then reannexed and so continuing till the sheriff's sale, passes to the purchaser of the land; and the fact that the sheriff's vendee knew of the sale of the fixture, and admitted that it belonged to the buyer, does not affect his title to it under the sheriff's sale.<sup>3</sup> But, by agreement of the owners and lien-creditors, machinery, which is part of the realty, may be detached and controverted into personalty, and then it will not pass under a sheriff's sale of the freehold.<sup>4</sup>

Under the description of the land, "with the buildings, furnaces, and other improvements thereon erected, known as the Shawnee Iron Works," a railroad, used in connection with the furnace, and extending across lands of a stranger (over which there was a right of way) to a landing, passes to the purchaser, though the word "appurtenances" was omitted in the levy.<sup>5</sup>

*Grain growing* on the land at the time of the sale, being the property of the defendant, passes to the purchaser; and one who purchased at a subsequent sheriff's sale of the grain, under an execution against the defendant, cannot maintain trover against the purchaser of the land for cutting and taking away the grain.<sup>6</sup> The test as to whether grain growing passes to the purchaser of the land at sheriff's sale, is whether there has or has not been a previous severance, either actually or by private or judicial sale.<sup>7</sup>

*The estate which passes* to the purchaser at sheriff's sale is in general that of the defendant which was levied on. The estate is qualified by the extent of the levy. Thus, where a defendant owned a life estate in the land and the fee simple in a moiety, under a sale of all his right, title, and interest the fee simple passed, but the life estate could not pass under the 6th, 7th, and 8th sections of the Act of 13th October 1840,<sup>8</sup> prescribing the mode of taking life estates in execution.<sup>9</sup> Where the widow was devisee for life, and confessed judgment, as administratrix, on a claim for paving done after the death of testator, it was held, that only her life estate passed to the purchaser.<sup>10</sup> And where the defendant was devisee in fee of a moiety, and executory devisee of the other moiety of a house, and a *fi. fa.* levied on both estates was returned unsold for want of buyers, and a *vend. exp.*, reciting this levy, commanded a sale of the vested moiety, to which the return was of a sale in obedience thereto, and the sheriff conveyed both estates, both moieties

<sup>1</sup> Johnson v. Mehaffey, 7 Wright 308.

<sup>2</sup> Rogers v. Gilinger, 6 Casey 185.

<sup>3</sup> Heaton v. Findlay, 2 Jones 304.

<sup>4</sup> Harlan v. Harlan, 8 Harris 303.

<sup>5</sup> Wright v. Chestnut Hill Iron Ore Co., 9 Wright 475.

<sup>6</sup> Bear v. Bitzer, 4 Harris 175.

<sup>7</sup> Bear v. Bitzer, 4 Harris 175; Groff v. Levan, Ibid. 179.

<sup>8</sup> Purd. Dig. 443, pl. 81-83, Pamph. L. 3.

<sup>9</sup> Dennison's Appeal, 1 Barr 201.

<sup>10</sup> Loud v. Bull, 1 Whart. 238.

passed, for the court will amend the return from the levy, it appearing clearly from the deed that all the land levied on was actually sold, and forty years having elapsed.<sup>1</sup> Where a lot was devised to one of the heirs subject to a valuation to be afterwards made, and before the valuation, was sold under a judgment against the devisee, the deed reciting that the sale was subject to the valuation, and after the valuation was again sold upon the same conditions on a judgment against the former vendee, the purchaser acquired only the devisee's interest in the lot, and not his share in the residuary estate, or in the amount of the valuation charged upon the lot.<sup>2</sup>

After judgment against the second husband, partition was had of the first husband's estate, and after levy upon the interest of the second husband in the estate of the decedent, the said estate was sold by the administrator under proceedings in partition, and some weeks afterwards the interest of the second husband was sold by the sheriff; by such sale the share assigned to the wife in the partition passed.<sup>3</sup>

The sheriff's vendee of a life estate is entitled during the life of the tenant to hold against the remainder-man.<sup>4</sup>

Formerly an estate tail was not barred by a sheriff's sale under a judgment against the tenant in tail:<sup>5</sup> but this seems to have been changed by the Act of 14th April 1859.<sup>6</sup> And it was long ago decided that where an estate tail is charged with the payment of a legacy, and sold under a judgment obtained by the legatee in a suit for the recovery of the legacy, the purchaser takes a fee simple.<sup>7</sup>

In general, where the defendant is the vendee under articles of agreement, the purchaser at a sheriff's sale of his interest, takes subject to the payment of the purchase-money.<sup>8</sup> In such case the purchaser is in a position inferior to that of the defendant, for the latter might set off, in an action for the purchase-money, any debt due him by the vendor, whereas the purchaser can only set off what was directly or indirectly given and received as payment.<sup>9</sup> Where the vendor is himself the purchaser at a sheriff's sale of his vendee's interest, it is virtually a rescission of the contract, and he has no further remedy for the unpaid purchase-money.<sup>10</sup> Where the sale of the vendee's interest is made under the vendor's judgment for purchase-money, the purchaser takes both the equitable estate of the vendee and the legal estate of the vendor, discharged of the lien of the purchase-money and judgment.<sup>11</sup> But where the vendor's judgment, on which the sale is made, is not for purchase-money, the vendor's estate does not pass, and the purchaser acquires only the equitable title subject to the vendor's lien for purchase-money.<sup>12</sup>

<sup>1</sup> *DeHaas v. Bunn*, 2 Barr 335.

<sup>2</sup> *Hart v. Homiller*, 8 Harris 248.

<sup>3</sup> *Bachman v. Chrisman*, 11 Harris 162.

<sup>4</sup> *McMullin v. Leslie*, 5 Casey 314.

<sup>5</sup> *Doyle v. Mullady*, 9 Casey 264. See

*Elliott v. Pearsoll*, 8 W. & S. 38.

<sup>6</sup> Sect. 1, *Purd. Dig.* 422, pl. 6, *Pamph. L.* 647.

<sup>7</sup> *Gause v. Wiley*, 4 S. & R. 502.

<sup>8</sup> *Stable v. Spohn*, 8 S. & R. 325;

*Bradley v. O'Donnell*, 8 Casey 279.

<sup>9</sup> *McGuire v. Faber*, 1 Casey 436.

<sup>10</sup> *Bradley v. O'Donnell*, 8 Casey 279.

<sup>11</sup> *Horbach v. Riley*, 7 Barr 81; *Vierheller's Appeal*, 12 Harris 105.

<sup>12</sup> *Vierheller's Appeal*, 12 Harris 105.

And where the legal title is held as security for certain claims, and one of the claimants so secured obtains judgment against the equitable owners and sells the land, the purchaser takes only the equitable interest, unless the holder of the legal title was instrumental in effecting the sale, or his assent to it appears of record.<sup>1</sup> A judgment against one of two joint vendees, under articles, and a sale thereunder, passes only the interest of the defendant—that of his co-vendee is not affected.<sup>2</sup> The equitable interest of a vendee under articles, on which a considerable portion of the purchase-money had been paid, does not pass under a levy and sale of all his right, title, and interest as tenant by the curtesy, although such misdescription in the levy, &c., was made by the sheriff, or at the instance of the plaintiff or his counsel, and although defendant knew of the error.<sup>3</sup>

Where the estate of a vendor under articles of agreement is sold on a judgment against him prior in date to the articles, the whole estate legal and equitable passes.<sup>4</sup> If the equitable vendee purchase at such sale, he remains liable to the vendor for the residue of the purchase-money, and can only deduct from the bond the amount paid at the time of the sale, even though the purchase-money was not due at that time.<sup>5</sup> And where the vendor's estate was encumbered, it was no abandonment of the contract for the vendee to purchase in an encumbrance, have the property sold at sheriff's sale, and become the purchaser himself.<sup>6</sup> A sale of vendor's interest under a judgment subsequent in date to the articles, passes only the estate remaining in the vendor after the contract of sale, and conveys to the purchaser a right to the unpaid purchase-money, subject to the payment of liens existing against the vendor prior to the date of the articles.<sup>7</sup> The prior liens are not divested by such sale.<sup>8</sup>

If at such sale under a judgment subsequent to the date of the articles, the equitable vendee become the purchaser, the vendor's claim for the balance of the purchase-money, beyond the amount paid to the sheriff, is not extinguished.<sup>9</sup> The equitable vendee so purchasing, is deemed a trustee for his vendor of a beneficial interest in the land, to the extent of the unpaid purchase-money.<sup>10</sup>

Where the estate of a decedent is sold under judgment against his personal representatives, the interest of the heirs is not divested unless they were made parties to the proceeding, as prescribed by the 34th section of the Act of 24th February 1834.<sup>11</sup> But the purchaser at a sale under a judgment obtained against an administrator in a suit originating in the lifetime of the decedent, where the heirs were not made parties, obtains a title good against strangers and

<sup>1</sup> *Hersey v. Turbett*, 3 Casey 418.

<sup>2</sup> *Arnold v. Cessna*, 1 Casey 34.

<sup>3</sup> *Craig v. Shields*, 2 Am. L. J. 256.

<sup>4</sup> *Garrard v. Lantz*, 2 Jones 186.

<sup>5</sup> *McGinnis v. Noble*, 7 W. & S. 454;

*Dentler v. Brown*, 2 Am. L. J. 96.

<sup>6</sup> *Crouse's Appeal*, 4 Casey 139.

<sup>7</sup> *Garrard v. Lantz*, 2 Jones 186;

*Patterson's Estate*, 1 Casey 71.

<sup>8</sup> *Patterson's Estate*, 1 Casey 71.

<sup>9</sup> *Garrard v. Lantz*, 2 Jones 186.

<sup>10</sup> *Ibid.* Though the vendor, after the sheriff's sale, cannot bring ejectment to enforce his contract with the equitable vendee, covenant will lie: the vendee cannot keep the land and the money he promised to pay for it: *Ibid.*

<sup>11</sup> *Purd. Dig.* 288, pl. 100, Pamph. L. 79; *Warden v. Eichbaum*, 2 Harris 121; *McCracken v. Roberts*, 7 *Ibid.* 390; *Smith v. Warden*, *Ibid.* 424.

intruders, though it should not be conclusive against the heirs and devisees.<sup>1</sup> A sale under a judgment against an executor, with notice to devisee, but without making the alienee of the latter a party, passes no title.<sup>2</sup> Notice to the widow and heirs of one who had granted land with intent to defraud his creditors is not necessary; the title passes at a sale under a judgment against such fraudulent grantor.<sup>3</sup> A sheriff's sale of the interest of an heir in his ancestor's real estate passes only the interest of the heir after payment of the debts of the ancestor, and the title of the purchaser is divested by a subsequent sale of the whole property under an order of the Orphans' Court for the payment of the debts of the ancestor.<sup>4</sup>

Where the defendant has conveyed the land in fraud of his creditors, and it is levied on and sold under a subsequent judgment, only the title of the fraudulent grantee passes, and the prior liens are not affected.<sup>5</sup> Such a sale is but a means of vesting in some particular person the right which the creditors have to avoid the conveyance.<sup>6</sup> But the title of sheriff's vendee cannot be gainsayed by the fraudulent grantee, whether the judgment were prior or subsequent to the conveyance.<sup>7</sup> Where a father conveyed to his son, and the property was sold under a judgment against the son alone, though for a debt incurred by both, the purchaser cannot recover by impeaching the conveyance, for if the deed be void the purchaser has acquired no title, as the sheriff's deed did not pass any estate of the father; if the conveyance be valid in the son it is good as to his creditors.<sup>8</sup>

The purchaser takes only the title of the defendant in execution, and if that is fraudulent it may be avoided by the creditors of the grantor, unless the purchaser can show that he is a *bond fide* purchaser for value, without notice.<sup>9</sup>

It has been questioned whether a judicial sale in Philadelphia, on a municipal claim filed under the Act of 16th April 1840,<sup>10</sup> would not pass the estate both of the owner of the fee and of the ground-rent.<sup>11</sup> But by a subsequent act it is provided that the estate in a ground-rent in fee shall not be divested by a sale for the non-payment of any tax, charge, or assessment imposed on the land.<sup>12</sup> Such sale passes the estate of the ground tenant whether the owner be named in the proceedings or not, for this is a proceeding *in rem*;

<sup>1</sup> *Riland v. Eckert*, 11 Harris 215.

<sup>2</sup> *Soles v. Hickman*, 5 Casey 342.

<sup>3</sup> *Smith v. Grim*, 2 Casey 95; *Drum v. Painter*, 3 Casey 148.

<sup>4</sup> *Horner v. Hasbrouck*, 5 Wright 169. Explaining *Swar's Appeal*, 1 Barr 93, and overruling *Milliken v. Kendig*, 2 Pa. R. 477, and *Luce v. Snively*, 4 Watts 396.

<sup>5</sup> *Byrod's Appeal*, 7 Casey 241; *Fisher's Appeal*, 9 Ibid. 294.

<sup>6</sup> *Fisher's Appeal*. Such conveyance is void as to the creditors without regard to the value of the interest conveyed: *Garrison v. Monaghan*, 9 Casey 233. But a conveyance of land by one

in embarrassed circumstances to a creditor, to pay an existing debt, is not fraudulent, although the parties contemplated that thereby the claims of other parties will be defeated: *Covanhovan v. Hart*, 9 Harris 495. And see *ante*, 804 *et seq.*

<sup>7</sup> *Miner v. Warner*, 2 Grant 448.

<sup>8</sup> *Eyrick v. Hetrick*, 1 Harris 488.

<sup>9</sup> *Hood v. Fahnestock*, 1 Barr 470.

<sup>10</sup> *Purd. Dig.* 751, pl. 23, 25, Pamph. L. 412.

<sup>11</sup> *Spring Garden's Appeal*, 8 W. & S. 444; *Salter v. Reed*, 3 Harris 260.

<sup>12</sup> Act 23d January 1849, § 5, *Purd. Dig.* 516, pl. 6, Pamph. L. 686

and the purchaser need not show that the Acts of Assembly have been strictly complied with; he is protected by his judgment.<sup>1</sup> Under such sale the purchaser takes a defeasible estate, subject to the right of redemption;<sup>2</sup> and his grantee is in the same situation.<sup>3</sup>

At a sale under a *levari facias*, in proceedings under a mortgage, the estate of the mortgagor passes, discharged from all equity of redemption, and all other encumbrances made or suffered by the mortgagor or his successors.<sup>4</sup> As we have already seen, a prior mortgage which is the first encumbrance is an exception to this, and is not discharged.<sup>5</sup> It is of course understood that the purchaser takes only the estate conveyed by the mortgage.<sup>6</sup>

Where there are several purchasers they hold their respective parts, purparts, or allotments in severalty, or as tenants in common, and not as joint tenants.<sup>7</sup>

*Purchaser's relations with a lessee of defendant.*—Where the lien under which the land was sold is subsequent in date to a lease given by the defendant, the lessee is tenant for years of the purchaser; where the lease is posterior in date to the lien the lessee becomes a tenant at will of the purchaser.<sup>8</sup> It is at the purchaser's option either to affirm or disaffirm an existing lease of the premises, which was made subsequent to the date of the judgment or of the mortgage.<sup>9</sup> If he chooses to disaffirm it, which he may do by giving the tenant notice to quit, he cannot claim anything under the terms of the lease.<sup>10</sup> And in such case the relation of landlord and tenant cannot be renewed by the tenant's remaining in possession, or by any act short of a mutual contract for a new lease.<sup>11</sup> And if the rent was payable in advance, and the purchaser disaffirms the lease, the tenant who has paid must have recourse to his lessor on his covenant for quiet enjoyment; or if he has not paid, it is competent for him to show that his lessor's title has expired or been divested.<sup>12</sup> The lessee of an equitable vendee of land, sold by the sheriff prior to the lease, and with the knowledge of the lessee, has no title as against the purchaser, and cannot maintain trespass against him for entering the dwelling-house in the absence of the lessee, and carelessly removing his goods.<sup>13</sup>

If the purchaser affirms the lease, he may claim the rent payable under it, and avail himself of the rights of the former owner to recover it.<sup>14</sup> The purchaser is entitled to rent only from the acknowledgment of the sheriff's deed.<sup>15</sup> If, by the contract, the rent is

<sup>1</sup> Delaney v. Gault, 6 Casey 63.

<sup>2</sup> Hess v. Potts, 8 Casey 407.

<sup>3</sup> Gault's Appeal, 9 Casey 94; City v. Lukens, D. C. Phila., 3 Phila. Rep. 333.

<sup>4</sup> Act of 1705, § 6, 1 Sm. Laws 59; Purd. Dig. 329, pl. 112.

<sup>5</sup> See ante, p. 1043 et seq.

<sup>6</sup> Act of 1705, § 8, 1 Sm. Laws 60; Purd. Dig. 329, pl. 114.

<sup>7</sup> Act of 1705, § 1, 1 Sm. Laws 32; Purd. Dig. 443, pl. 79.

<sup>8</sup> Bittenger v. Baker, 5 Casey 66.

<sup>9</sup> Hemphill v. Tevis, 4 W. & S. 535;

Menough's Appeal, 5 W. & S. 433; Groff v. Levan, 4 Harris 179.

<sup>10</sup> F. & M. Bank v. Ege, 9 Watts 436.

<sup>11</sup> Hemphill v. Tevis, 4 W. & S. 535.

<sup>12</sup> Market Co. v. Lutz, D. C. Phila., 4 Phila. Rep. 322.

<sup>13</sup> Kellam v. Janson, 5 Harris 467.

<sup>14</sup> Menough's Appeal, 5 W. & S. 433.

<sup>15</sup> Act 16th June 1836, § 119, Purd. Dig. 451, pl. 143, Pamph. L. 783; Braddee v. Wiley, 10 Watts 362; Scheerer v. Stanley, 2 Rawle 276; Thomas v. Connell, 5 Barr 13; Garrett v. Dewart, 7 Wright 342.



payable in advance at the beginning of the year, a purchaser in the middle of the year is not entitled to it.<sup>1</sup> Rent payable in kind, without specification of the day of payment, is payable at the expiration of the year.<sup>2</sup>

The 119th section of the Act of 1836<sup>3</sup> provides that, upon receiving his deed, a purchaser at sheriff's sale shall be deemed the landlord of the lessee, or other person holding or claiming to hold under the defendant, and shall have the like remedies as defendant might have had, to recover the rent accruing subsequently to the acknowledgment of the sheriff's deed, whether such rent may have been paid in advance or not, if paid after the rendition of the judgment. This section applies only while the relation of landlord and tenant continues.<sup>4</sup> The object of this section was to avoid the fraud and collusion arising from payment of rents in advance, where they were not by the terms of the lease due, thereby depriving the purchaser of so much; if, therefore, the tenant anticipate his payments after the rendition of the judgment, he does it at the risk of liability, under the act, to pay over again to the purchaser.<sup>5</sup> This, as we have seen, does not apply to rent payable in advance by the terms of the lease. The purchaser is entitled to rent payable after the sale as against the assignee of the defendant, by order accepted by the tenant.<sup>6</sup> Where the sale took place after the expiration of the term for years, the purchaser is not entitled to rent which accrued before, but which was not payable till after the sale; but if the rent is yet becoming due out of a term not completed at the date of the sale, it is rent "accruing thereafter," within the meaning of the act, and passes by the sale.<sup>7</sup> The fall grain sown in any one year, belongs to the tenancy of that year, and as the term for the crop does not extend beyond the next succeeding harvest, the purchaser at a sheriff's sale, made after that harvest, is not entitled to any share of the grain as rent; it does not pass with the reversion.<sup>8</sup> And where, by the terms of the lease, the landlord's share of the grain as rent became due on the 1st of September, and was delivered to him, the sale having been made on the 21st of April, but the deed not being acknowledged till the 27th of September, the purchaser was not entitled to any share of the grain; and it gave the purchaser no greater interest, that the purchase-money was paid to the sheriff at the time of the sale, and before it was made payable by the conditions of sale; nor did the fact that the mortgage, under which the sale was made, was anterior to the lease, give the purchaser any claim to the rent.<sup>9</sup> Where the rent was appropriated by the terms of the lease to the payment of a debt due from the

<sup>1</sup> *F. & M. Bank v. Ege*, 9 Watts 436; *Fullerton v. Shaffer*, 2 Jones 221; *Market Co. v. Lutz*, D. C. Phila., 18 Leg. Int. 229; s. c., 4 Phila. Rep. 322.

<sup>2</sup> *Boyd v. McCombs*, 4 Barr 146.

<sup>3</sup> *Purd. Dig.* 451, pl. 143, Pamph. L. 783.

<sup>4</sup> *Hemphill v. Tevis*, 4 W. & S. 535.

<sup>5</sup> *Bank v. Ege*, 9 Watts 436; *Fullerton v. Shaffer*, 2 Jones 221.

<sup>6</sup> *Menough's Appeal*, 5 W. & S. 432; *Boyd v. McCombs*, 4 Barr 146. And see *Bank of Pa. v. Wise*, 3 Watts 400.

<sup>7</sup> *Bank of Pa. v. Wise*, 3 Watts 400; *Braddee v. Wiley*, 10 Watts 362; *Hart v. Israel*, 2 Browne 22; *Borrell v. Dewart*, 1 Wright 134.

<sup>8</sup> *Borrell v. Dewart*, 1 Wright 134.

<sup>9</sup> *Garrett v. Dewart*, 7 Wright 342.

lessor to a third person, and for which the lessee was surety, it is considered paid to the landlord from the time of the contract, and does not pass to the purchaser.<sup>1</sup>

Where land is sold under a judgment prior in date to a lease for years, the lessee is entitled to the way-going crop sown by him prior to the levy and condemnation, in preference to the sheriff's vendee.<sup>2</sup> The lessee, in such circumstances, becomes a tenant at will of the purchaser, and if he had sown his crop before notice of the purchaser's intention to determine his tenancy, he would be entitled to take it away.<sup>3</sup> Where the occupant of the land at the time of the sale was assignee of a lease for a year, with the express right of "seeding in the fall and carrying away the crop," and had himself sowed the grain, he can claim against the sheriff's vendee the value of the crop carried away; nor does the fact that at the sheriff's sale the tenant gave notice that he claimed the crop "because it had been put in" by him, and because he had bought it at a tax sale, estop him from claiming it under the lease.<sup>4</sup>

*Encumbrances and liabilities.*<sup>5</sup>—In the exercise of a reasonable discretion, the courts have not been rigid in the application of the maxim of *caveat emptor* to judicial sales, but have always liberally interfered for the protection of an erring purchaser untainted by fraud.<sup>6</sup>

As the purchaser has no right to the possession and profits of the land until the acknowledgment and delivery of the deed, he is not personally liable for ground-rent accruing between the date of the sale and the date of his deed.<sup>7</sup> Where the sale was made subject to an apportioned ground-rent, the purchaser takes subject to the rent.<sup>8</sup>

The purchaser is of course not liable for encumbrances which have been discharged by the sheriff's sale, but he is bound, without notice, to come in at the return of the writ, take part in the distribution, and defend his particular interest at his peril; and where he had notice from the auditor he is concluded by the decree, and cannot set up a want of notice in a subsequent proceeding.<sup>9</sup>

In sales under a mortgage the purchaser holds the estate clearly discharged and freed from all equity and benefit of redemption, and all other encumbrances made or suffered by the mortgagor, his heirs or assigns.<sup>10</sup> So a purchaser of land under a judgment on the bond accompanying a mortgage, holds it clear of a lease made by the mortgagor, after the mortgage, but before the entry of the judgment on the bond.<sup>11</sup> But a purchaser at a sale on *levari facias*, under mortgage, takes subject to an agreement by the mortgagor to sell the land.<sup>12</sup>

<sup>1</sup> Fullerton v. Shaufer, 2 Jones 220.

<sup>2</sup> Bittinger v. Baker, 5 Casey 66, overruling Sallade v. Jones, 6 Barr 144; Groff v. Lavan, 4 Harris 179.

<sup>3</sup> Ibid.

<sup>4</sup> Miller v. Clement, 4 Wright 489.

<sup>5</sup> See *ante*, p. 1037-47.

<sup>6</sup> Crawford v. Boyer, 2 Harris 380, per BELL J.

<sup>7</sup> Thomas v. Connell, 5 Barr 13.

<sup>8</sup> Wistar v. Mercer, C. P. Phila., 22 Leg. Int. 236.

<sup>9</sup> Towers v. Tuscarora Academy, 8 Barr 297.

<sup>10</sup> Act of 1705, § 6, 1 Sm. Laws 59.

<sup>11</sup> McCall v. Lenox, 9 S. & R. 302.

<sup>12</sup> Catlin v. Robinson, 2 Watts 373.

The question whether a mortgage is discharged by a sale under a subsequent judgment has already been considered.<sup>1</sup> If not, the purchaser takes only the equity of redemption.<sup>2</sup> When the sale is subject to a mortgage, and the purchaser pays it off, and takes an assignment to himself, he cannot claim the amount out of the assigned estate of the mortgagor.<sup>3</sup> So one who purchased the interest of one of the heirs of a decedent, subject to a mortgage, is not entitled to have money, subsequently raised by sale of other property of decedent under order of Orphans' Court, applied to pay off such mortgage.<sup>4</sup> But a purchaser at sheriff's sale, subject to a building association mortgage, is entitled to credit for the value of the shares of stock assigned to the association as collateral security for the mortgage-debt.<sup>5</sup> And the purchaser at sheriff's sale of one of several shares of land, subject to a mortgage, is not thereby personally chargeable with a proportion of the mortgage-debt, paid after the sale by one of the other owners, in the absence of proof that he purchased on condition of assuming such liability; and his mere declarations, made either before or after the sale, that he was bound to pay part of the said mortgage-debt, are too slight evidence to create such liability without proof of consideration for the promise, especially if made after his interest had been determined by a sale under a prior mortgage.<sup>6</sup>

Where land is devised at a valuation to be paid by the devisee, and the devise is accepted, the title passes subject to the charge, and if the devisee's interest is sold by the sheriff, and in all the proceedings the title is described as subject to the unpaid valuation, the purchaser takes the land so charged.<sup>7</sup> Where at a sale by order of the Orphans' Court the widow's third was not specially charged on the land, but the heirs having purchased afterwards conveyed by deed declaring that the one-third remained charged on the land during the widow's lifetime, and during her lifetime the land was sold under a judgment obtained against the grantee after the conveyance, the purchaser at the sheriff's sale took subject to the charge, though it was not specially made by the order of sale of the Orphans' Court.<sup>8</sup> But where a widow, administratrix, executes a conveyance, pursuant to a contract of her husband, without adding a description of her office, her dower does not thereby pass, and if the vendee, who had agreed to apply part of his purchase-money in satisfying all judgments and liens against the vendor, purchase at a sheriff's sale under one of those judgments, he takes subject to the dower, for he was bound to discharge the judgment under which the sale was made.<sup>9</sup> Where the widow, whose dower was charged on land, died between the levy and sale, the purchaser took the land divested of the lien.<sup>10</sup>

<sup>1</sup> See *ante*, p. 1043 *et seq.*

<sup>2</sup> *Pierce v. Potter*, 7 Watts 475; *Berger v. Hiester*, 6 Whart. 210; *Bratton's Appeal*, 8 Barr 167.

<sup>3</sup> *Cooley's Appeal*, 1 Grant 401.

<sup>4</sup> *Hay's Estate*, O. C. Phila., 2 Phila. Rep. 277.

<sup>5</sup> *Kupfert v. Build. Ass.*, 6 Casey 465.

<sup>6</sup> *Wager v. Chew*, 3 Harris 323.

<sup>7</sup> *Hart v. Homiller's Executor*, 8 Harris 248; *Same v. Same*, 11 Harris 39.

<sup>8</sup> *Kline v. Bowman*, 7 Harris 24; *Schertzer's Executors v. Herr*, *Ibid.* 34.

<sup>9</sup> *Shurtz v. Thomas*, 8 Barr 359.

<sup>10</sup> *Riddle's Appeal*, 1 Wright 177.

A widow's dower is not a lien, which is subject to be discharged by a sheriff's sale, but an estate in the land.<sup>1</sup>

Though the general rule is, that in the absence of express stipulations to the contrary, a sheriff's sale discharges all prior liens against the title, yet where the conditions defining the liens to which a sale was subject were in writing and were expressed in the sheriff's deed, the court will not relieve the purchaser from any part of his bid, but will enforce the contract of sale.<sup>2</sup>

Current taxes not due at the time of the sale, because the period for completing the assessment had not expired, and the tax-rate had not been fixed, nor the appeal held, are not discharged by the sale: and if the proceeds are insufficient to pay and discharge the whole of the *registered* taxes, those not paid remain a lien on the property and must be paid by the purchaser.<sup>3</sup>

Where the real estate of any corporation is sold at sheriff's sale for the payment of *bond fide* debts, the purchaser's title is discharged from any right of forfeiture to the commonwealth by reason of misnomer, limitation, or defect of power in such corporation to purchase and hold such lands.<sup>4</sup>

*Purchaser as trustee.*—Since the passage of the Act of 22d April 1856,<sup>5</sup> a trust in lands cannot be established by parol evidence without writing.<sup>6</sup> A promise to purchase at a sheriff's sale for the benefit of the defendant, will not constitute the purchaser a trustee for him unless the purchase were made with the money of the defendant.<sup>7</sup> A resulting trust is raised only from fraud in obtaining the title, or from payment of the purchase-money when the title is acquired; a subsequent repayment of the purchase-money is not sufficient.<sup>8</sup>

A joint debtor in the judgment may purchase at a sale of the land of his co-defendant, if with his own money and for his own use.<sup>9</sup>

Where one joint tenant sold the land of himself and his co-tenant, by articles of agreement taking a mortgage to himself to secure the purchase-money, and afterwards sold the premises under the mortgage and became himself the purchaser, the effect was merely to cancel such unsuccessful sale, and not to vest a new title in the purchaser on his own account.<sup>10</sup> So a purchase by one joint tenant at a sheriff's sale of the whole estate, renders him a trustee for his co-tenants.<sup>11</sup>

Where the grantor was bound to discharge an encumbrance, if he purchase at a sheriff's sale under it, his purchase will enure to the

<sup>1</sup> Schall's Appeal, 4 Wright 170.

<sup>2</sup> Ibid.

<sup>3</sup> Duffy v. City of Phila., 6 Wright 192.

<sup>4</sup> Act 13th April 1844, § 2, Purd. Dig. 199, pl. 42, Pamph. L. 532.

<sup>5</sup> Sect. 4, Purd. Dig. 497, pl. 3, Pamph. L. 533.

<sup>6</sup> Barnet v. Dougherty, 8 Casey 371. This was the law before the Act of 1856. See Leshey v. Gardner, 3 W. & S 315.

<sup>7</sup> Fox v. Heffner, 1 W. & S. 372; Barnet v. Dougherty, 8 Casey 371; Kellum v. Smith, 9 Casey 158; Hogg v. Wilkins, 1 Grant 68.

<sup>8</sup> Ibid.

<sup>9</sup> Gibson v. Winslow, 2 Wright 49.

<sup>10</sup> Jack v. Woods, 5 Casey 375.

<sup>11</sup> Gibson v. Winslow, 10 Wright 380. And the recitals in the sheriff's deed are notice of the trust to the vendees of the purchaser: Ibid.

benefit of his grantee.<sup>1</sup> An administrator purchasing lands at a sheriff's sale, the purchase-money being settled by using bonds belonging to the estate, which were a lien on the land, and no money being paid, becomes a trustee for the heirs of the deceased.<sup>2</sup>

The rule prohibiting a trustee to purchase for his own use the property towards which he stands in a fiduciary relation, does not apply when the sale is made by a public officer, under proceedings adverse to the interest of the *cestui que trust*, and the trustee has not the means in his power to prevent the sale.<sup>3</sup> An agent or attorney buying at a sale under a judgment of his principal becomes a trustee if he pay with the money of his principal or purchase for less than his claim, but in such case the principal has an election either to consider the purchaser as trustee and claim the land, or to consider him as a debtor and claim the money; and if he has not elected to treat the purchaser as trustee, the evidence being the other way, he cannot enforce his right against a purchaser at a subsequent sheriff's sale, who had no notice of the resulting trust nor of the intention of the principal to enforce it.<sup>4</sup>

Notwithstanding the general rule that a tenant cannot dispute the title of his landlord, if he purchase the landlord's title at sheriff's sale, he may defend his possession: and he is not estopped by a previous failure in an attempt to enforce a mortgage against the same land.<sup>5</sup>

If one of two plaintiffs undertakes to collect the judgment, he cannot purchase at the sale for his own benefit at a less price than the amount of the judgment: he is a trustee for his co-plaintiff to the extent of the latter's interest.<sup>6</sup>

*The time to which the title of purchaser relates*, is for most purposes the date of the acknowledgment of the sheriff's deed. Thus he is not entitled to rent which accrued before the acknowledgment.<sup>7</sup> Nor has he any right of possession until after the acknowledgment;<sup>8</sup> though his tenant who takes possession between the sale and the acknowledgment cannot be treated as an intruder.<sup>9</sup>

But for some purposes the title of the purchaser relates back to the date of the sheriff's sale. Thus he has such an inceptive interest before he gets his deed as may be bound by a judgment, and when his title is perfected by payment and conveyance, such judgment by relation embraces the whole estate.<sup>10</sup> So where, between the sale and the acknowledgment, there has been a second sale and acknowledgment, the first purchaser nevertheless takes the land, as his title for that purpose relates back to the date of the sale.<sup>11</sup> For some purposes the purchaser's title relates back even beyond the sale. Thus under a sale in proceedings on a mortgage, the purchaser's

<sup>1</sup> Skinner v. Starner, 12 Harris 123.

<sup>2</sup> Beck v. Uhrich, 1 Harris 636.

<sup>3</sup> Meanor v. Hamilton, 3 Casey 137;  
Chorpenning's Appeal, 8 Casey 315.

<sup>4</sup> Eshleman v. Lewis, 13 Wright 410.

<sup>5</sup> Elliott v. Smith, 11 Harris 131.

<sup>6</sup> Leisenring v. Black, 5 Watts 303.

<sup>7</sup> Act 16th June 1836, § 119, Purd.

Dig. 451, pl. 143, Pamph. L. 783;  
Thomas v. Connell, 5 Barr 13; Garrett  
v. Dewart, 7 Wright 342.

<sup>8</sup> Storch v. Carr, 4 Casey 135.

<sup>9</sup> Smith v. Grim, 2 Casey 95.

<sup>10</sup> Hartman v. Stahl, 2 Pa. R. 223;

Slater's Appeal, 4 Casey 169.

<sup>11</sup> Hoyt v. Koons, 7 Harris 277.

title relates back to the date of the mortgage.<sup>1</sup> And where land was conveyed subject to the payment of a certain sum to a third person, and the deed referred to a bond for the same amount executed at the same time, and afterwards the land was sold under a judgment on the bond, the liens created by the deed and by the judgment on the bond arose out of the same transaction, and were in contemplation of law one instrument, and formed one security, and the lien of the judgment related to the date of the lien in the deed, and consequently the purchaser's title related to the date of the deed, and was good against a terre-tenant who had purchased before the judgment.<sup>2</sup>

2. *Proceedings to obtain possession.*—By the sale and conveyance the defendant becomes *quasi a tenant at will* to the purchaser, and his possession is not deemed adverse.<sup>3</sup> The defendant will not be suffered to set up an adverse title, and as between him and the purchaser in an action of ejectment, the latter can recover on the strength of the sale and sheriff's deed without showing other title. From the time of the levy, the *jus possessionis* is in the sheriff's vendee, where the debtor is in possession at the time of the levy, and the debtor cannot, with a view to defeat the creditor, treacherously deliver possession even to the real owner, who must pursue his remedy against the purchaser.<sup>4</sup> The sheriff cannot turn the defendant out of possession by force and put the purchaser in possession.<sup>5</sup> The purchaser may if he chooses bring ejectment against any one in possession, and this course he is compelled to pursue where the *terre-tenant* claims under a title adverse to that of the defendant, or claims under the defendant but by title derived before the judgment under which the sale is made. But where the possession is in the defendant himself, or in one claiming under the defendant by title derived subsequently to the judgment, a summary remedy to recover possession is provided by the Act of 1836, which is similar to the Acts of 6th April 1802,<sup>6</sup> and 14th March 1814;<sup>7</sup> though the older acts extend to sales under any execution whatever, and are perhaps not fully supplied by that of 1836. The same remedy is given by a subsequent act to purchasers at Orphans' Court sales, after confirmation of the sale and acknowledgment of the deed.<sup>8</sup> But an order of sale awarded in an action of partition is not within the act.<sup>9</sup>

The sheriff's vendee may lawfully obtain possession of the premises in a fair way from the tenant of the defendant in the execution.<sup>10</sup>

*Notice.*—The first step to be taken by the purchaser is to notify the parties in possession of the sale, and require them to surrender

<sup>1</sup> De Haven v. Landell, 7 Casey 120.

<sup>2</sup> Bury v. Sieber, 5 Barr 431. Such *terre-tenant*, without notice of the suit on the bond, may set up any defence in ejectment by the purchaser, which he could have taken in the suit on the bond had he been a party: *Ibid.*

<sup>3</sup> 1 Johns. Cas. 153; Stahle v. Spohn, 8 S. & R. 317.

<sup>4</sup> *Ibid.*

<sup>5</sup> Penn v. Kirkpatrick, Add. 193, 203.

<sup>6</sup> 3 Sm. Laws 530.

<sup>7</sup> 6 Sm. Laws 132.

<sup>8</sup> Act 9th April 1849, § 16, *Pard. Dig.* 451, pl. 142, *Pamph. L.* 527.

<sup>9</sup> *Fitzgibbons v. Keller*, S. Ct., 31st January 1852, MS.

<sup>10</sup> *St. Clair's Heirs v. Shale*, 8 Harris 105.

the same to him within three months from the date of notice.<sup>1</sup> A form of such notice may be found in Smith.<sup>2</sup> Such notice cannot be given before the acknowledgment of the sheriff's deed.<sup>3</sup> Where, after giving notice, the sheriff's vendee sold to another who also gave notice, it was held that the first notice formed no objection to the recovery of the second vendee.<sup>4</sup> The certificate of the acknowledgment of the sheriff's deed constitutes the only proof of the time at which the title of the sheriff's vendee accrued: a variance between that and the date of the deed is not material.<sup>5</sup>

*Petition to two justices.*—If the terms of the notice are not complied with, the purchaser, his heirs or assigns, may apply to any two justices of the peace or aldermen of the city, town, or county where the land lies, by petition setting forth: 1. That he purchased the premises at a sheriff's or coroner's sale. 2. That the person in possession at the time of the application is the defendant, as whose property the land was sold, or that he came into possession thereof under him. 3. That such person in possession had notice as aforesaid of such sale, and was required to give up such estate three months previous to such application.<sup>6</sup> A form of such petition is given by Smith.<sup>7</sup> The application should be verified by the oath or affirmation of the petitioner, or probable cause to believe the facts therein set forth be otherwise shown.<sup>8</sup> The sheriff's deed is conclusive evidence of the right to possession against the defendant in the execution, and all claiming under him subsequently to the judgment.<sup>9</sup>

*Warrant to the sheriff.*—Upon these facts being sworn to or otherwise established by the petitioner, the justices are required and enjoined forthwith to issue their warrant in the nature of a summons, directed to the sheriff of the county, commanding him to summon a jury of twelve men of his bailiwick, to appear before them at a time and place to be specified within four days after the issue of the warrant, and also to summon the defendant, or person in possession as aforesaid, at the same time and place, to appear before them and the said jury, to show cause, if any he has, why delivery of the possession of the premises should not forthwith be given to the petitioner.<sup>10</sup> A form of the warrant may be found in Smith.<sup>11</sup> No person but the sheriff himself is competent to perform the duty of selecting the jurors; it is a judicial act, requiring judgment and discretion, which cannot be delegated to another.<sup>12</sup> Under the Landlord and Tenant Law, from which this proceeding is borrowed, the summons may be made returnable before the fourth day;<sup>13</sup> and if

<sup>1</sup> Act 16th June 1836, § 105, Purd. Dig. 450, pl. 128, Pamph. L. 780.

<sup>2</sup> Smith's Forms 389, pl. 40.

<sup>3</sup> Hawk v. Stouch, 5 S. & R. 159; Act 16th June 1836, § 105, Purd. Dig. 450, pl. 128, Pamph. L. 780.

<sup>4</sup> Brown v. Gray, 5 Watts 17.

<sup>5</sup> Ibid.

<sup>6</sup> Act 16th June 1836, § 106, Purd. Dig. 450, pl. 129, Pamph. L. 780.

<sup>7</sup> Smith's Forms 390, pl. 41.

<sup>8</sup> Ibid., § 107; Purd. Dig. 450, pl. 130.

<sup>9</sup> Hale v. Henrie, 2 Watts 147; Dean v. Connelly, 6 Barr 239.

<sup>10</sup> Act 16th June 1836, § 107.

<sup>11</sup> Smith's Forms 391, pl. 42.

<sup>12</sup> See Railroad Co. v. Heister, 8 Barr 445, 452.

<sup>13</sup> Hower v. Krider, 15 S. & R. 43.

there be more than four days between the issue and return of the precept, it is cured by the tenant's appearance.<sup>1</sup>

*The inquisition.*—If the defendant or *terre-tenant* fail to appear at the time and place appointed for the hearing, the justices are to require proof, by oath or affirmation, of the due service of such warrant upon him, and of the manner of such service, which must have been made three days before the return.<sup>2</sup>

If the defendant or *terre-tenant* be duly summoned, or if he appears, the justices and jury proceed to inquire:—1. Whether the petitioner or those under whom he claims, became the purchaser of the land in question at a sheriff's or coroner's sale; of this fact the deed, duly acknowledged and certified, is full and conclusive evidence:<sup>3</sup> in such case the only question submitted to the justices and jury on this point is, whether there is a sheriff's or coroner's deed, in fact and form, duly acknowledged in open court, and duly certified under the seal of the court; it was never intended by the act to make such tribunal a court of error, to examine the regularity of the proceedings in court as to the judgment, process of sale, and execution of deed.<sup>4</sup> 2. Whether the person in possession of such real estate was the defendant in execution under which the land was sold, or came into possession under him as aforesaid.<sup>5</sup> 3. Whether the person so in possession has had three months' notice of the sale, previous to such application.<sup>6</sup> It is sufficient if the jury find that the purchaser gave "due and legal notice" to the defendants.<sup>7</sup> A form of the inquisition is given by Smith.<sup>8</sup>

*Record and award.*—Upon the finding of these facts, the justices must make a record thereof, and thereupon award the possession to the petitioner.<sup>9</sup> The record should set out all the facts necessary to give jurisdiction.<sup>10</sup> But where the petition sets out the facts necessary to give the justices jurisdiction, and the inquest recites that they found these facts to be true, it is sufficient, though the facts are not otherwise stated in the inquest.<sup>11</sup>

Where the defendant is in possession at the time of the levy and sale, he cannot make any defence against the purchaser: by the purchase under regular process, the purchaser acquires a right at least to the possession of the debtor.<sup>12</sup> But this rule does not apply

<sup>1</sup> *Stroup v. McClure*, 4 Yeates 523; *Blashford v. Duncan*, 2 S. & R. 481.

<sup>2</sup> Act 16th June 1836, § 108.

<sup>3</sup> *Ibid.*, § 109.

<sup>4</sup> *Dean v. Connelly*, 6 Barr 239.

<sup>5</sup> Act 16th June 1836, § 109.

<sup>6</sup> Act 16th June 1836, § 109, *Purd.* Dig. 450, pl. 132.

<sup>7</sup> *Cooke v. Reinhart*, 1 Rawle 317. And see this case as to the legal effect of the finding.

<sup>8</sup> Smith's Forms 393, pl. 44.

<sup>9</sup> Act 16th June 1836, § 110, *Purd.* Dig. 450, pl. 133.

<sup>10</sup> *Blashford v. Duncan*, 2 S. & R. 480; *Fahnestock v. Faustenauer*, 5 *Ibid.* 174; *McGee v. Fessler*, 1 Barr 126. See *Stroup v. McClure*, 4 Yeates 523.

These decisions were under the Landlord and Tenant Law. The form of the record is given in Smith's Forms 392, pl. 43.

<sup>11</sup> *McKeon v. King*, 9 Barr 213.

<sup>12</sup> *Lessee of Culbertson v. Martin*, 2 Yeates 443; *Stahle v. Spohn*, 8 S. & R. 317; *Arnold v. Gorr*, 1 Rawle 223; *Young v. Algeo*, 3 Watts 223; *Knox v. Herod*, 2 Barr 27; *Snively v. Wagner*, 3 *Ibid.* 275; *Dunlap v. Cook*, 6 Harris 454; *Wetherill v. Curry*, D. C. Phila., 2 Phila. Rep. 98. The above cases were not under the Two Justices Act, but the common ejectment by sheriff's vendee. The rule is, however, the same under that act: *Walker v. Bush*, 6 Casey 357.



to a sale where the process is void, as where the sheriff undertook to sell a life estate before the Act of 1849, which he could not do:<sup>1</sup> in such case evidence by the defendant that he took the land in question as his wife's purpart, and that it was less in value than her share of the estate, is competent, for in such case the husband having nothing to pay out of his own funds, acquired but a life estate which the sheriff could not sell.<sup>2</sup> And one admitted to defend as landlord of the tenant, who came in under the debtor, may show that he and the debtor are tenants in common.<sup>3</sup>

And where matter of defence arises subsequently to the judgment but before the sale, such as payment and satisfaction, or a release, the defendant's remedy is by application to the court to stay proceedings, or set aside the process, or perhaps to stop the acknowledgment of the sheriff's deed; but he cannot set up these matters to defeat the purchaser's right of possession under the deed; nor can he show that the judgment was paid before the sale under it, although the purchaser was plaintiff in the judgment.<sup>4</sup> So, where the judgment was confessed by an attorney in excess of his authority, it is the duty of defendant to make early application to the court to open the judgment: if this be omitted and his land be sold under it, he is concluded from raising the objection against the sheriff's vendee: giving notice at the sale of the defect in the authority of the attorney, amounts only to notice that the defendant then knew of the defect, but had taken no proper measures to arrest the proceedings.<sup>5</sup> A bill of exceptions cannot be taken in such proceedings.<sup>6</sup> In proceedings under the Landlord and Tenant Law, if the inquest cannot agree, they may be discharged and a new jury summoned.<sup>7</sup>

*Damages and costs.*—If the jury find for the petitioner, they are to assess such damages as they may think right, against the defendant or *terre-tenant*, for the unjust detention of the premises, and thereupon the justices will enter judgment for the damages assessed, and reasonable costs, which judgment is final and conclusive between the parties.<sup>8</sup> The jury must make the assessment of damages: it is error for the justices to make it, and *nul tiel record* may be pleaded to a *sci. fa. sur recog.* on damages so assessed.<sup>9</sup> The practice under the Landlord and Tenant Law, is for the justices to give judgment for a gross sum for costs; and the court on *certiorari* will presume that the costs were duly taxed.<sup>10</sup> The judgment cannot be certified to the Common Pleas, under the Act of 1810, in order to create a lien on real estate.<sup>11</sup> But it is said an action of debt

<sup>1</sup> Snavely v. Wagner, 3 Barr 275.

<sup>2</sup> Ibid.

<sup>3</sup> Knox v. Herod, 2 Barr 27.

<sup>4</sup> Hale v. Henrie, 2 Watts 147. Especially when he has thus lain quiet, and allowed an innocent purchaser to pay his money, he is estopped from setting up the invalidity of the sale: Dean v. Connelly, 6 Barr 239.

<sup>5</sup> Cyphert v. McClune, 10 Harria 195.

<sup>6</sup> McKeon v. King, 9 Barr 213.

<sup>7</sup> Cunningham v. Gardner, 4 W. & S. 120.

<sup>8</sup> Act 16th June 1836, § 111, Purd. Dig. 450, pl. 134.

<sup>9</sup> Hull v. Russell, C. P. Wyoming, 10 P. L. J. 131.

<sup>10</sup> Brown v. Gray, 5 Watts 17.

<sup>11</sup> Gault v. McKinney, D. C. Phila., 2 Phila. 71.

may be maintained upon it.<sup>1</sup> But such action did not lie under the Act of 1802.<sup>2</sup>

*Delivery of possession.*—Upon the finding for the petitioner the justices must issue their warrant, directed to the sheriff, commanding him forthwith to deliver to the petitioner, his heirs or assigns, full possession of the premises, and to levy the costs taxed by the justices, and the damages assessed by the jury.<sup>3</sup> The form of the warrant may be found in Smith.<sup>4</sup>

*Certiorari.*—Although the act makes the judgment final and conclusive between the parties, yet the proceedings may be removed by *certiorari* to the Common Pleas, or to the Supreme Court at the party's election.<sup>5</sup> But the *certiorari* will not be a *supersedeas*, or have any effect to prevent or delay the execution, or the delivery of possession agreeably thereto.<sup>6</sup> It does not bring up the evidence: the regularity of the proceedings alone can be examined.<sup>7</sup> And on a reversal, restitution is *ex gratia* and may be refused.<sup>8</sup> On the *certiorari*, the only matter in issue is the existence of an independent title in the defendant: he cannot go into anything else.<sup>9</sup>

Under the Act of 1802, on a removal of the proceedings to the Common Pleas, a formal joinder in issue was unnecessary.<sup>10</sup> Now, however, though the parties might proceed to trial without formal issue joined, and it would not be error perhaps after verdict, yet the surety on the bond would not be bound.<sup>11</sup>

In such proceeding a matter of defence which has arisen since the removal of the cause is available for the defendant:<sup>12</sup> as a purchase by him of the land, since the removal, as the property of the plaintiff.<sup>13</sup>

A writ of error is the proper remedy for the revision of the judgment of the Common Pleas on a *certiorari*.<sup>14</sup> In reversing the judgment of the Common Pleas, the Supreme Court may restore the possession to the purchaser to whom it had been awarded by the justices.<sup>15</sup>

*Proceedings where the terre-tenant disclaims.*—If the person in possession of the premises makes oath or affirmation before the justices either, 1. That he has not come into possession, and does not claim to hold under the defendant, but in his own right; or 2. That he has come into possession under title derived to him from the defendant before the judgment under which the sale took place, and enters into the recognisance hereafter explained, with one or more

<sup>1</sup> Gault v. McKinney, D. C. Phila., 2 Phila. Rep. 71.

<sup>2</sup> Moyer v. Kirby, 14 S. & R. 162.

<sup>3</sup> Act 16th June 1836, § 112.

<sup>4</sup> Smith's Forms 394, pl. 45.

<sup>5</sup> Lenox v. McCall, 3 S. & R. 101. See McClure v. White, Add. 192, Boggs v. Black, 1 Binn. 333; Clarke v. Yeat, 4 Binn. 185; Clark v. Patterson, 6 Binn. 128; Grubb v. Fox, Ibid. 461; Snyder v. Bauchman, 8 S. & R. 340; Cooke v. Reinhart, 1 Rawle 317.

<sup>6</sup> Act 16th June 1836, § 113.

<sup>7</sup> Brown v. Gray, 5 Watts 17; Canal

Co. v. Keiser, 7 Harris 137. See McMillan v. Graham, 4 Barr 140. There is no bill of exceptions in such case by which the evidence may be put upon the record: Brown v. Gray, 5 Watts 17.

<sup>8</sup> McGee v. Fessler, 1 Barr 126.

<sup>9</sup> Hale v. Henrie, 2 Watts 147.

<sup>10</sup> Minier v. Saltmarsh, 5 Watts 293.

<sup>11</sup> Hibbs v. Rue, 4 Barr 348.

<sup>12</sup> Brownfield v. Braddee, 9 Watts 149.

<sup>13</sup> Ibid.

<sup>14</sup> Cooke v. Reinhart, 1 Rawle 317.

<sup>15</sup> Ibid.

sufficient sureties, the justices are to forbear to give the judgment above mentioned.<sup>1</sup> The forms of affidavits in these cases are given by Smith.<sup>2</sup> A tenant for years of a devisee, who purchased the land at a sale under a judgment against the devisor, holds by title paramount to his lessor, and is not under the Act of 1836 liable to summary proceedings to obtain possession by one who had purchased the land at a previous sale under a judgment against the devisee.<sup>3</sup>

The defendant in the execution cannot stay proceedings in the manner above described, by making affidavit that he is in possession under a contract with the sheriff's vendee, on which he has paid a part of the consideration-money.<sup>4</sup> He must show either a conveyance, or such an equitable right to one, as would sustain a decree for a specific performance.<sup>5</sup>

An affidavit that the terre-tenant does not hold the whole of the premises under the defendant is insufficient—he should specify what part.<sup>6</sup> The oath is sufficient if it contains a positive averment, that the title is derived from the defendant before the judgment, though it does not specify when the title commenced in possession.<sup>7</sup>

A tenant for years of the defendant who has purchased at sheriff's sale of the land, under a judgment against the devisor of defendant, holds by a title paramount to his lessor, and is not liable to be summarily dispossessed by the purchaser of his landlord's estate at sheriff's sale.<sup>8</sup>

It is sufficient if the oath and recognisance be tendered at any time before the judgment.<sup>9</sup>

*Where he names his grantor or lessor.*—If the person in possession makes oath or affirmation, before the justices, that he does not hold under the defendant, but under some other person whom he names,<sup>10</sup> the justices must forthwith summon<sup>11</sup> such person to appear before them at a time specified, within thirty days, and if he appears at the time appointed, and makes oath or affirmation that he verily believes that he is legally entitled to the premises in dispute, and that he does not claim under the defendant, but by a different title, or that he claims under the defendant by title derived before the judgment, and enters into the recognisance hereafter described, with sureties, as aforesaid, in such case also the justices must forbear to give judgment.<sup>12</sup> The following is the form of the oath or affirmation to be administered to the claimant in such case:—"I do (swear or affirm) that I verily believe that I am legally entitled to hold the premises in dispute, against the petitioner, that I do not claim the same by, from, or under the defendant as whose property the same

<sup>1</sup> Act 16th June 1836, § 114, *Purd. Dig.* 451, pl. 137, *Pamph. L.* 782.

<sup>2</sup> *Smith's Forms*, 395, pl. 46, 396, pl. 47.

<sup>3</sup> *Elliott v. Ackla*, 9 *Barr* 42. And see *Newell v. Gibbs*, 1 *W. & S.* 496.

<sup>4</sup> *Brown v. Gray*, 5 *Watts* 17; *Cress v. Righter*, *S. Ct.*, 7 April 1853, *MS.*

<sup>5</sup> *Debozeare v. Butler*, 2 *Grant* 417. This was under the Landlord and Tenant Law. See *Brown v. Gray*, 5 *Watts* 17.

<sup>6</sup> *Hawk v. Stouch*, 5 *S. & R.* 157.

<sup>7</sup> *Lenox v. McCall*, 3 *S. & R.* 95.

<sup>8</sup> *Elliott v. Ackla*, 9 *Barr* 42. See *Newell v. Gibbs*, 1 *W. & S.* 496.

<sup>9</sup> *Lenox v. McCall*, 3 *S. & R.* 95.

<sup>10</sup> See Form of such Affidavit, *Smith's Forms* 396, pl. 48.

<sup>11</sup> See Form of the Summons, *Smith's Forms* 397, pl. 49.

<sup>12</sup> Act 16th June 1836, § 115, *Purd. Dig.* 451, pl. 138.

were sold (as the case may be),—that I do not claim the same by, from, or under the defendant, as whose property the same were sold, by title derived to me subsequently to the rendition of the judgment under which the same were sold, but by a different title," &c.<sup>1</sup>

*The recognisance* must be taken in a sum fully sufficient to cover and secure as well the value of the rents and mesne profits of such lands and tenements, which may have accrued, and which may be expected to accrue, before the final decision of the claim, as all costs and damages, with condition that the cognisor shall appear at the next Court of Common Pleas, or District Court, having jurisdiction, and then and there plead to any declaration in ejectment which may be filed against him, and thereupon proceed to trial, in due course of practice, and in case he shall fail therein, that he will deliver up the said premises to the purchaser, and pay him the full value of the rents or mesne profits of the premises, accrued from the time of the purchase.<sup>2</sup> After the recognisance has been entered into, it is not necessary that the plaintiff should go on and prosecute the proceedings before the justices to an issue, but it is sufficient compliance with the terms of the recognisance for him to proceed at the *next* term of the proper court with an ejectment; and upon a verdict therein for mesne profits and costs, and a return of *nulla bona*, the bail in the recognisance becomes liable thereupon.<sup>3</sup> But the commencement of an amicable action of ejectment at the *third* term after the date of the recognisance, and a recovery therein, is not evidence to charge the surety.<sup>4</sup>

Upon the forfeiture of the recognisance, the justices must proceed to give judgment, and cause the premises to be delivered up to the petitioner, as in the case of no defence being made.<sup>5</sup>

*The ejectment* is of course subject to the general rules in regard to the action of ejectment, which will be found elsewhere.<sup>6</sup> But it has some peculiarities which will be more suitably discussed in this place. The person in possession having made oath that "he does not claim the land through or under the defendant, as whose property the same was sold, by title derived subsequently to the rendition of the judgment under which it was sold, but by a different title," becomes the actor in court, and must establish that the title under which he claims is paramount to and different from the one sold by the sheriff, or else he fails,<sup>7</sup> and therefore the judgment, execution, and sale are admitted by him, and are in fact part of the process, and the sheriff's deed, properly acknowledged and certified, is admissible in evidence, even though the acknowledgment was taken after the sheriff's term had expired, and the deed was not delivered to the purchaser until some time after the acknowledgment.<sup>8</sup> If he shows such title, and it appears to have been obtained by a fraudulent collusion between him and the former owner, for the purpose of

<sup>1</sup> Act 16th June 1836, § 116, *Purd.* Dig. 451, pl. 139. A form is given in *Smith's Forms* 398, pl. 50.

<sup>2</sup> *Ibid.*, § 117. See the Form of the Recognisances, *Smith's Forms* 398, pl. 51.

<sup>3</sup> *Tenbrooke v. Bell*, D. C. Phila., Dec. 1848, MS.

<sup>4</sup> *Hibbs v. Rue*, 4 Barr 348.

<sup>5</sup> Act 16th June 1836, § 118, *Purd.* Dig. 451, pl. 141.

<sup>6</sup> Vol. II., "Ejectment."

<sup>7</sup> *Dean v. Connelly*, 6 Barr 239; *Walker v. Bush*, 6 Casey 352.

<sup>8</sup> *Dean v. Connelly*, 6 Barr 239.

defeating the legitimate effect of the sheriff's sale, it will not avail as a defence.<sup>1</sup>

Where the plaintiff claims under a judgment confessed by an administrator, it is not necessary for him to produce the letters of administration, but the defendant may show by evidence *aliunde* that the proceedings were collusive.<sup>2</sup> It has often been decided that in ejectment by the sheriff's vendee, the court will not inquire into the formality of the proceeding on which the sale was founded.<sup>3</sup>

The record of the justices is part of the *res gestæ* of the whole case, and may be exhibited in evidence for the purpose of showing when the proceedings were commenced.<sup>4</sup> Evidence inconsistent with the claim before the justices cannot be given by defendant.<sup>5</sup> The certifying the cause into court is equivalent to a removal by *certiorari* to a higher court for trial, and the proceedings thereafter are part of the same cause that was begun before the justices.<sup>6</sup> Damages for the wrongful detention are properly included in the verdict, even though notice of such claim be not given; and a verdict for plaintiff for a sum of money, though informal, is necessarily a verdict for damages for the wrongful detention, and involves a finding of the title in his favor; and the proper judgment may be entered thereon.<sup>7</sup>

Where the *terre-tenant* is known to claim under a title adverse to that of the defendant, or derived from the defendant prior to the judgment under which the sale was made, the proper course for the purchaser is to commence his ejectment directly, in the ordinary form, without incurring the delay and expense of the proceedings before two justices, which, in such case, would only lead him by a circuitous route to the same point. The following are a few of the principles which have been decided in such proceedings.

The purchaser must of course show a good title in himself by means of the record, and the proceedings in the execution, down to the acknowledgment of the sheriff's deed.<sup>8</sup> And on the trial the *venditioni* may be amended, by the *præcipe*, by inserting the name of one of the defendants.<sup>9</sup> So, a missing record may be proved by secondary evidence, but its existence and loss must first be established by competent proof; therefore, where no deed was shown, the existence of a petition and an order of the court thereon authorizing the sheriff to make a deed, being in the nature of a judgment, cannot be presumed against a stranger to the proceeding who claims by virtue of a possession altogether distinct from and independent of it.<sup>10</sup> The existence of the record will only be *presumed* after a great lapse of time.<sup>11</sup> And where the jury presumed the loss of a *venditioni* between February 1800 and July 1811, and

<sup>1</sup> Walker v. Bush, 6 Casey 352.

<sup>2</sup> McDonald v. Mulhollan, 5 Watts 173.

<sup>3</sup> Young v. Taylor, 2 Binn. 227. See 513. *ante*, p. 1027.

<sup>4</sup> Dean v. Connelly, 6 Barr 239.

<sup>5</sup> Kimball v. Kelsey, 1 Barr 183.

<sup>6</sup> Walker v. Bush, 6 Casey 352.

<sup>7</sup> Ibid.

<sup>8</sup> Lanning v. London, 4 W. C. C. R.

<sup>9</sup> Sickler v. Overton, 3 Barr 325.

<sup>10</sup> Baskin v. Seechrist, 6 Barr 154.

<sup>11</sup> Woods v. Lane, 2 S. & R. 53.

there were no circumstances to authorize the presumption, besides the length of time, the court granted a new trial.<sup>1</sup>

Where the plaintiff produced a transcript containing a short entry of a judgment in a *sci. fa. sur* mortgage, and a certificate that the *sci. fa.* could not be found, it was held admissible.<sup>2</sup>

But proof of the existence of the *venditioni* may be supplied by circumstances.<sup>3</sup> The sheriff's authority to sell and convey must be shown.<sup>4</sup>

In case of a sale under a mortgage, the mortgage and precept to the sheriff must be produced by the plaintiff in the ejectment.<sup>5</sup>

The conditions of the sale are part of the *res gestæ*, and are admissible in evidence on the part of the plaintiff.<sup>6</sup>

Where the *terre-tenant* is a stranger the title must be made out; if the *terre-tenant* is the defendant in the judgment, or one claiming under him, it is sufficient to show the judgment, and the proceedings under it.<sup>7</sup> If no title is shown to exist in the defendant, the record, sheriff's sale, &c., are not evidence.<sup>8</sup>

It is not necessary for the purchaser, under a *levari facias*, to prove that due notice of the time and place of sale was given; nor that the sheriff's return should state that the notice had been given.<sup>9</sup>

The defences which may be taken in these cases amount in general to this, that the execution-defendant had no estate in the land sold, and consequently the judgment was no lien upon it. Evidence inconsistent with the claim before the justices cannot be given by defendant.<sup>10</sup> But if the defendant afterwards acquire possession, under a better title than that obtained by the plaintiff under the sheriff's deed, he may avail himself of it in the ejectment.<sup>11</sup> And he may show a title derived from a sheriff's sale of the land to him as the property of the petitioner, after the commencement of the proceedings before the justices, and whilst the cause is pending in court, and thus defeat the plaintiff's recovery.<sup>12</sup> So, if the first sale was subject to a mortgage, under which the land was sold a second time, the first purchaser cannot recover possession of the land, though he may recover the costs of suit.<sup>13</sup> So, if the first sale was under a judgment against a devisee, and the second sale was under a judgment against the devisor, the first purchaser cannot recover the land against the second.<sup>14</sup>

The wife of the execution-defendant not infrequently claims the land as her separate property. If the judgment upon which the land was sold was confessed by her deceased husband, she may

<sup>1</sup> Willing v. Brown, 6 S. & R. 457.

<sup>2</sup> Lanning v. Dolph, 4 W. C. C. R. 624.

<sup>3</sup> Moorhead v. Pearce, 2 Yeates 456.

<sup>4</sup> Seechrist v. Baskin, 7 W. & S. 403.

<sup>5</sup> Marshall v. Ford, 1 Yeates 195.

<sup>6</sup> Arnold v. Gorr, 1 Rawle 223.

<sup>7</sup> Wilson v. McVeagh, 2 Yeates 86;

Little v. Delancey, 5 Binn. 270; Cooper

v. Galbraith, 3 W. C. C. R. 546;

Arnold v. Gorr, 1 Rawle 223; Schall

v. Miller, 3 Whart. 250.

<sup>8</sup> Arnold v. Gorr, 1 Rawle 223.

<sup>9</sup> Topper v. Taylor, 6 S. & R. 173.

<sup>10</sup> Kimball v. Kelsey, 1 Barr 183.

<sup>11</sup> Cooper v. Galbraith, 3 W. C. C. R. 546.

<sup>12</sup> Brownfield v. Braddee, 9 Watts 149.

<sup>13</sup> Street v. Sprout, 5 Watts 272.

<sup>14</sup> Elliott v. Ackla, 9 Barr 42. See Newell v. Gibbs, 1 W. & S. 496.

show that this was done with the fraudulent design of destroying her title, the purchaser having notice of the fraud, and of her title; and she may show this in an ejectment by the sheriff's vendee, because she could not contest the validity of the judgment in a *scire facias* against her as administratrix of her husband, it being valid as between the parties.<sup>1</sup> When the land sold under a judgment against the husband belongs to the wife, she need not become a party to the record; her husband may defend her interest in an ejectment by the sheriff's vendee brought against the husband alone.<sup>2</sup> The question whether the wife is the real owner of land purchased during coverture depends upon whether the purchase-money was her own separate funds; this must be clearly and fully proved; that she had the means of payment is not sufficient; in the absence of such proof the presumption is violent that the husband furnished the means of payment.<sup>3</sup> Money in possession of the wife, or anything purchased with such money, is *prima facie* the property of her husband, as well since as before the Act of 1848.<sup>4</sup> Admissions made by her vendor at the time he received the deed under which he held the property, which had been used by her in a former ejectment, brought against her by the representative of such vendor, to show an equitable estate in her husband, were held to be her own admissions by adoption, and competent evidence of the fact which they tended to establish.<sup>5</sup>

All who come into possession under the defendant in the execution are estopped by the judgment from disputing the plaintiff's right of possession.<sup>6</sup> Thus, the *terre-tenants* cannot set up a mortgage and release of the equity of redemption given by the defendant to one of them.<sup>7</sup> Nor can it be set up that the title purchased at the sheriff's sale was only an equitable one.<sup>8</sup> Nor can the defendant set up an outstanding title in another.<sup>9</sup>

The defendant cannot prove the value of the property to affect the purchaser's title.<sup>10</sup>

Nor will a mere error in the proceedings overturn the vendee's title.<sup>11</sup>

But it seems, where the *terre-tenant* was not a party to the *scire facias* in which the judgment was obtained, he may make any defence to the ejectment which would have been open to him on the *scire facias*.<sup>12</sup>

And the defendant may show that he had but a life estate, and that consequently the sale passed no title.<sup>13</sup>

<sup>1</sup> Mitchell v. Kintzer, 5 Barr 216.

<sup>2</sup> McElfattrick v. Hicks, 9 Harris 402.

<sup>3</sup> Winter v. Walter, 1 Wright 155.

See ante, pp. 795 et seq., 805-6.

<sup>4</sup> Winter v. Walter, 1 Wright 156.

<sup>5</sup> Ibid.

<sup>6</sup> Nace v. Hollenback, 4 S. & R. 540;

Eisenhart v. Slaymaker, 14 S. & R.

153; Green v. Watrous, 17 S. & R.

393; Dennison's Appeal, 1 Barr 201;

Snively v. Wagner, 3 Barr 275.

<sup>7</sup> Eisenhart v. Slaymaker, 14 S. & R. 153.

<sup>8</sup> Cooper v. Galbraith, 3 W. C. C. R. 546.

<sup>9</sup> Young v. Algeo, 3 Watts 223.

<sup>10</sup> Mott v. Clark, 9 Barr 400.

<sup>11</sup> Springer v. Brown, 9 Barr 305.

See ante, p. 1097.

<sup>12</sup> Nace v. Hollenback, 1 S. & R. 540.

<sup>13</sup> Snively v. Wagner, 3 Barr 275.

See Blocher v. Carmouy, 1 S. & R. 460

*The terre-tenant may defend as vendee of the execution-defendant prior to the judgment on which the land was sold.*

Where a vendee of the execution-defendant, by a parol sale, who is in possession of the land, had notice of the intended sheriff's sale, and made a statement that he owned no land, in the presence of one who afterwards purchased at the sale, he should give actual notice of his title; his mere possession will not be constructive notice after such declaration; *it seems* that an advertisement, in the same newspaper, with the sheriff's advertisement, or a written notice posted at the place of sale, will be sufficient.<sup>1</sup> A sheriff's vendee of an equitable estate under articles, without notice of a prior unrecorded conveyance of the legal title, is not bound to tender the purchase-money before bringing ejectment against the claimant under the unrecorded conveyance, who claims to hold the land not as security for the unpaid purchase-money, but absolutely and in bar of the title of the sheriff's vendee; but it is otherwise where the owner of the legal title acknowledges the trust.<sup>2</sup>

But if the prior sale was fraudulent, the vendee of the execution-defendant has no title as against the subsequent sheriff's vendee. And this class of cases is of frequent occurrence, the most effective mode of testing a suspected fraudulent sale of his land by a debtor being for the creditor to sell it under execution against the debtor, purchase it himself, and bring ejectment against the sheriff's vendee.<sup>3</sup> A conveyance by a defendant in a judgment to his son, intended to delay and hinder creditors, is fraudulent as to creditors, whether the consideration amount to the value of the land sold or not;<sup>4</sup> in such case the father being in possession at the time of the sale of the land under an execution against him, the son cannot set up against the sheriff's vendee an outstanding title in another.<sup>5</sup> A fraudulent grantee cannot set up the discharge and insolvent assignment of the grantor against a creditor who has pursued the land, and purchased it at a sheriff's sale under an execution against the grantor, founded on a claim existing against him at the time of his discharge.<sup>6</sup>

*The terre-tenant may defend on the ground that the judgment was no lien on the land sold.* Thus, he may show that he was a tenant in common with the defendant who held the legal title as trustee, and that the plaintiff had notice of these facts.<sup>7</sup> And where a judgment was obtained on a *sci. fa. quare ex. non* against one whose interest in the land was not bound by the judgment, although the *terre-tenant* was summoned under the *sci. fa.*, he will not thereby be prevented from setting up his adverse title, in an ejectment by the sheriff's vendee.<sup>8</sup> But the report of the auditor making distribution of the proceeds, having been confirmed, is evi-

<sup>1</sup> Keeler v. Vantuyle, 6 Barr 250.

<sup>2</sup> Stewart v. Freeman, 10 Harris 120.

<sup>3</sup> See *ante*, p. 805.

<sup>4</sup> Zerbe v. Miller, 4 Harris 488.

<sup>5</sup> *Ibid.*

<sup>6</sup> Hollinshead v. Allen, 5 Harris 275.

The subject of fraudulent conveyances

is discussed in Smith's Leading Cases, Twyne's Case, Vol. I. And see *ante*, p. 804.

<sup>7</sup> Knox v. Herod, 2 Barr 26.

<sup>8</sup> Mitchell v. Hamilton, 8 Barr 486; Drum v. Kelly, 10 Casey 415.



dence against the defendant in an ejectment brought by the purchaser at the sheriff's sale, to show that such defendant had been a claimant against the proceeds under a judgment against the execution-defendant, though not *conclusive* against the defendant in the ejectment; his claim, although rejected by the auditor, was an admission that the execution-defendant had some interest in the land sold.<sup>1</sup> And in ejectment by sheriff's vendee to recover possession, it will be presumed, after a great lapse of time, that the debts for which the land had been assigned long prior to the judgment and sale were paid, and that the debtor's resulting interest in the land by operation of law was complete, and consequently that the sheriff's vendee could recover.<sup>2</sup>

The *terre-tenant* cannot impeach the judgment under which the sale was made, except for fraud or collusion.<sup>3</sup> Thus it is no defence that the judgment was confessed by an attorney without authority.<sup>4</sup> In such case his only remedy is by action against the attorney.<sup>5</sup> And we have already seen that irregularities in obtaining the judgment, or in the proceedings under it, must be objected to as a general rule before the acknowledgment, or they will be cured.<sup>6</sup>

Where the defendant had no notice of the suit.—After a sale under proceedings in a *sci. fa.* on a municipal claim, although it is no defence to an ejectment by the sheriff's vendee that the real owner was not named in the proceedings, yet if he had a good defence to the payment of the debt for which his land was sold, and, not having been a party to the *sci. fa.*, had no opportunity to make it there, he may make it in the ejectment; it is a sufficient defence that the claim was actually paid to the proper officer before the issuing of the writ, although such payment was made through mistake by the owner of the adjoining lot, and the money was subsequently refunded to him, for such payment having been received in satisfaction of the debt due by the lot might have been lawfully retained.<sup>7</sup>

One with whose privity and under whose direction the sale was made is estopped from controverting the sale, so far as relates to any interest he possessed.<sup>8</sup> And so of one who participated in the proceeds.<sup>9</sup>

It is not competent for the defendant in the ejectment to prove a fraudulent combination to defraud creditors between himself and the sheriff's vendee.<sup>10</sup>

In an ejectment by the executors of the sheriff's vendee against a mortgagee in possession under an unrecorded mortgage, the defendant acquires no additional equities against the plaintiffs from the

<sup>1</sup> Garrigues v. Harris, 5 Harris 345. But that the auditor's report is not evidence in the ejectment, see Leeds v. Bender, 6 W. & S. 315.

<sup>2</sup> Webb v. Dean, 9 Harris 29.

<sup>3</sup> Postens v. Postens, 3 W. & S. 182. See *ante*, p. 1099.

<sup>4</sup> Fetterman v. Murphy, 4 Watts 424; Beeson v. Beeson, 9 Barr 289; Hinds v. Scott, 1 Jones 24; Irwin v. Nixon,

*Ibid.* 419; Evans v. Meylert, 7 Harris 402.

<sup>5</sup> Evans v. Meylert, 7 Harris 402.

<sup>6</sup> See *ante*, p. 1027 *et seq.*

<sup>7</sup> Delaney v. Gault, 6 Casey 63.

<sup>8</sup> Willing v. Brown, 7 S. & R. 467.

<sup>9</sup> Stroble v. Smith, 8 Watts 280. See Wilson v. Bigger, 7 W. & S. 126.

<sup>10</sup> Leshoy v. Gardner, 3 W. & S. 315.

fact that the mortgagor is entitled to a share of the residuary estate under the will of the plaintiffs' testator.<sup>1</sup>

## SECTION V.

### EXECUTION AGAINST THE PERSON—CAPIAS AD SATISFACIENDUM.

If the defendant have neither personal nor real estate liable to execution, the plaintiff, subject to certain restrictions and qualifications hereafter to be mentioned, may have execution against the person of the defendant.<sup>2</sup>

*Where it lies.*—The general rule is, that whenever a *capias* is allowable on *mesne process* before judgment, it may be had on the judgment itself.<sup>3</sup> The provisions of the act abolishing imprisonment for debt,<sup>4</sup> in effect restrict the use of the *capias ad satisfaciendum* to judgments in actions for fines and penalties, on promises to marry, on moneys collected by any public officer, for any misconduct or neglect in office or in any professional employment, and in actions on *torts*.<sup>5</sup> The neglect of an attorney to pay over money collected for his client is a "neglect in a professional employment," and he may be arrested on a judgment obtained in *assumpsit* for money so collected; in such case it is not necessary that the action should be in *tort* in order to authorize the arrest.<sup>6</sup>

This process lies for a defendant to recover his costs upon a judgment in his favor.<sup>7</sup>

*When it issues.*—The plaintiff may have a *feri facias* and a *capias ad satisfaciendum* at the same time.<sup>8</sup> It was a general practice before the Act of 1836 to issue both writs at the same time, where it was uncertain whether the defendant had property, and then if none was found the sheriff was enabled by an immediate service of the *ca. sa.* to obtain the only remaining security for the plaintiff's claim, the debtor's body.

But if a *fi. fa.* be already in operation the plaintiff cannot legally proceed against the body of the defendant. Therefore, when a *fi. fa.* is returned "levied subject to prior executions," it is incumbent on the plaintiff, before he can issue a *ca. sa.*, to compel a sale of the property levied on, in order to put a judicial termination to the first writ;<sup>9</sup> and although he finds the property altogether worthless as a means of satisfaction, he cannot abandon a levy upon real property

<sup>1</sup> *Wilson v. Shoenberger's Executors*, 10 Casey 121.

<sup>2</sup> Act 16th June 1836, § 19, *Purd. Dig.* 432, pl. 10, *Pamph. L.* 764.

<sup>3</sup> 3 *Salk.* 286; 3 *Co.* 12. See *ante* 283 *et seq.*, 293 *et seq.*

<sup>4</sup> Act 12th July 1842, § 1, *Purd. Dig.* 432, pl. 18, *Pamph. L.* 399.

<sup>5</sup> The proceedings "as for contempt to enforce civil remedies" excepted in the act are not by *ca. sa.*, but by attachment. And it has been held that a decree for the payment of money

only cannot be enforced by imprisonment; though a decree for the delivery of deeds, and the payment of money, may be so enforced so far as the deeds are concerned: *Com. v. The Keeper, &c.*, S. Ct., 2 *Phila. Rep.* 153.

<sup>6</sup> *Wills v. Kane*, 2 *Grant* 60.

<sup>7</sup> 2 *Str.* 1217; 1 *Bos. & Pul.* 480.

<sup>8</sup> Act 16th June 1836, § 27, *Purd. Dig.* 432, pl. 16, *Pamph. L.* 765.

<sup>9</sup> *Burk v. McFall*, 2 *Browne* 144, *per curiam*.

condemned, and take out a *ca. sa.*, without the leave of the court.<sup>1</sup> If after a levy on defendant's lands, the plaintiff issues a *ca. sa.*, and the defendant submits thereto, and obtains his discharge under the Insolvent Law, the submission to the *ca. sa.* renders the *fi. fa.* irregular, all proceedings on it are gone, and the sheriff selling the land after such discharge will not be allowed to acknowledge a deed to the purchaser.<sup>2</sup>

Although both a *feri facias* and *capias ad satisfaciendum* may be had at the same time, yet they cannot both be served;<sup>3</sup> and if the plaintiff have levied his *fi. fa.* on the defendant's lands, and then taken him upon a *ca. sa.*, the defendant may at his option set aside either of the writs.<sup>4</sup> So in the case of a *ca. sa.* and an attachment-execution he must elect which writ he will pursue, though his election is not determined till one of the writs has been executed.<sup>5</sup>

And no writ of *capias ad satisfaciendum* can in any case be executed where the defendant has real or personal estate within the county sufficient to satisfy the judgment.<sup>6</sup> The plaintiff, in case of necessity, should issue the *fi. fa.* and *ca. sa.* together, with directions to the officer to call on the defendant to show his property, and to execute the *capias* only in case he refused to do so: if the plaintiff has the *ca. sa.* executed without this precaution he subjects himself to an action of *trespass vi et armis*, if it appear that the defendant had sufficient property to satisfy the judgment;<sup>7</sup> and in such case the *ca. sa.*, being not merely irregular but void, will be quashed by the court.<sup>8</sup> But the writ, though void, is nevertheless a justification to the officer who executed it.<sup>9</sup> After the defendant has been illegally discharged from, and retaken upon the same execution, it is too late to offer to show property; the offer should be made previous to the original arrest.<sup>10</sup> The exemption from arrest under the Act of 1836 is a privilege, and if the defendant submit to arrest and gives bond he waives the privilege.<sup>11</sup>

If the defendant have not sufficient property in the county to fully satisfy the judgment and costs of execution, the *ca. sa.* may be executed, but only for the deficiency.<sup>12</sup>

If after a *fi. fa.* levied on personal property and returned, the plaintiff releases the levy; this, though an extinguishment of the debt as respects third persons, does not operate as a satisfaction as between the plaintiff and defendant, if the debt remains unpaid.<sup>13</sup>

*Form.*—The writ of *capias ad satisfaciendum* commands the sheriff to take the defendant and him safely keep, so that he may have his body in court on the return day to satisfy the plaintiff. In

<sup>1</sup> Bank of Pa. v. Latshaw, 9 S. & R. 10.

<sup>2</sup> Young v. Taylor, 2 Binn. 218.

<sup>3</sup> Burke v. McFall, 2 Browne 144. See Act 16th June 1836, §§ 27, 28, Purd. Dig. 432, pl. 16, 17, Pamph. L. 765.

<sup>4</sup> Tiffin v. Tiffin, 2 Binn. 202.

<sup>5</sup> Act 16th June 1836, § 20, Purd. Dig. 432, pl. 11; Davies v. Scott, 2 Miles 52.

<sup>6</sup> Act 16th June 1836, § 28, Purd. Dig. 433, pl. 17, Pamph. L. 765.

<sup>7</sup> Berry v. Hamill, 12 S. & R. 210.

<sup>8</sup> Allison v. Rheam, 3 S. & R. 139.

<sup>9</sup> Ibid.

<sup>10</sup> Hecker v. Jarret, 3 Binn. 404.

<sup>11</sup> Winder v. Smith, 6 W. & S. 424.

<sup>12</sup> Act 16th June 1836, § 28, Purd. Dig. 432, pl. 17, Pamph. L. 765.

<sup>13</sup> Duncan v. Harris, 17 S. & R. 436.

point of form this process must pursue the judgment;<sup>1</sup> therefore on a joint judgment against several defendants it must include them all.<sup>2</sup> It should regularly be returnable on a general return day, in like manner as the former proceedings.<sup>3</sup> If part of the debt have been levied on a *fi. fa.*, the *ca. sa.* may be for the remainder.<sup>4</sup>

If informal, it may be amended in like manner as the *feri facias*.<sup>5</sup> In matters arising from the mere carelessness of the clerk, in process, amendments are allowed even after error brought.<sup>6</sup>

*Service.*—It is the duty of the sheriff to arrest the defendant if he can be found, unless he is privileged from arrest, and keep him in custody until discharged by due course of law. Whether the judgment or execution be avoidable is a point which the sheriff is never permitted to raise, and, having arrested the party, he is bound to keep him till duly discharged.<sup>7</sup> If he discharge him without the authority of the plaintiff or his agent, or take bail for his appearance without such authority, the sheriff will render himself liable for the debt.<sup>8</sup>

The arrest cannot be made on Sunday.<sup>9</sup>

*Privilege from arrest.*—It is manifest that there is a radical difference between arrest upon *mesne* and upon *final* process. The first is intended merely to bring the defendant before the court, and compel him to give security to abide the event of the suit; the other is intended to obtain satisfaction of a debt adjudged against him. It is therefore to be expected that we shall find some differences as to the privileges of the defendant in the two cases. The privileges of members of Congress and of the legislature; of ambassadors and other public ministers, or their domestic servants; of members of corporations aggregate; and of witnesses, counsel, and suitors in attendance upon courts of justice, *eundo*, *morando*, and *redeundo*, are the same under final process as under the *capias ad respondendum*, to which reference is made.<sup>10</sup> As regards suitors, however, this privilege has been denied in two cases,<sup>11</sup> which have been often doubted,<sup>12</sup> and are now expressly overruled.<sup>13</sup> And witnesses are not protected throughout the term at which the cause was marked for trial, nor while transacting their private business after having been discharged from the obligation of the *subpoena*.<sup>14</sup>

The privileges of soldiers, militiamen, lunatics, women, and executors, have been already considered.<sup>15</sup> And the privilege from property has just been explained.<sup>16</sup>

<sup>1</sup> Tidd Pr. 1027.

<sup>2</sup> 6 T. R. 526-7.

<sup>3</sup> Tidd Pr. 1028. See *ante*, p. 868-9.

<sup>4</sup> 4 Johns. 407.

<sup>5</sup> Tidd Pr. 1028.

<sup>6</sup> See *Peddle v. Hollingshead*, 9 S. & R. 284; *ante*, p. 869; *post*, Vol. II., "Amendments."

<sup>7</sup> *Commonwealth v. Leekey*, 1 Watts 67; 16 Johns. 165.

<sup>8</sup> *Dowdel v. Hamm*, 2 Watts 63, ROGERS, J.

<sup>9</sup> Act of 1705, § 4, 1 Sm. Laws 25; *Purd. Dig.* 924, pl. 1.

<sup>10</sup> See *ante*, 245, *et seq.*

<sup>11</sup> *Starret's Case*, 1 Dallas 356; *Hannum v. Askew*, 1 Yeates 25.

<sup>12</sup> *Hurst's Case*, 4 Dallas 388, in note; *Miles v. McCullough*, 1 Binn. 77.

<sup>13</sup> *Parker v. Hotchkiss*, 1 Wall. Jun. 268.

<sup>14</sup> *Smythe v. Banks*, 4 Dall. 329.

<sup>15</sup> See *ante*, Chap. VI., Sect. I., 245.

<sup>16</sup> *Ante*, p. 1125.

Infants<sup>1</sup> and bail<sup>2</sup> are not privileged. And a *ca. sa.* may be served upon a bankrupt, after the commissioners have signed his certificate of discharge, and before it is allowed by the district judge.<sup>3</sup>

The doctrine of privilege will not be extended to the injury of honest creditors.<sup>4</sup>

If the defendant is illegally arrested he should sue out a *habeas corpus*, or apply by motion to the court for relief.<sup>5</sup> And the order of a court of competent jurisdiction discharging a defendant from arrest upon this ground, will be a conclusive justification in an action against the sheriff for an escape.<sup>6</sup> But a discharge upon a *habeas corpus* by a judge of the Common Pleas, without notice to the plaintiff, is void, and the defendant may be retaken on the same execution.<sup>7</sup>

But the court will not interfere in a summary way and relieve a defendant from arrest in execution, unless his case is made out entirely to their satisfaction; where his equity is not clear they will leave him to his action.<sup>8</sup>

*Escape.*—If a party escape or be rescued from arrest on a *ca. sa.*, though the sheriff is thereby liable, because he ought to have taken the *posse comitatus*, yet the plaintiff may retake such prisoner on a new *ca. sa.*, or sue out another kind of execution on the judgment, and shall not be compelled to take his remedy against the sheriff, who may be dead or insolvent.<sup>9</sup> And he may commence suit against the sheriff and take out execution against the property of the defendant at the same time; for the remedies are not inconsistent with each other.<sup>10</sup>

After an escape the sheriff may himself retake the defendant;<sup>11</sup> unless the escape were with his permission, in which case he cannot arrest or detain him without new process.<sup>12</sup>

*The sheriff's liability.*—If the sheriff suffer the defendant to go at large he becomes absolutely liable for the debt and costs,<sup>13</sup> unless by the authority of the plaintiff or his agent.<sup>14</sup> And as a prisoner in actual custody on one writ, is, by operation of law, in custody on every other writ lodged against him in the sheriff's office, and also as a prisoner arrested by the undersheriff or bailiff is legally in the custody of the high sheriff, who is exclusively liable in case he escapes,<sup>15</sup> it has been held that the sheriff is liable for an escape where he has returned *non est inventus* to a *ca. sa.* delivered to him, if prior to the return day his deputy had the defendant in custody under another *ca. sa.*, and discharged him; though it did not

<sup>1</sup> 2 Str. 1227.

<sup>2</sup> 6 Johns. 97, Starkie 502.

<sup>3</sup> *Peson v. Passmore*, 4 Yeates 139.

<sup>4</sup> See *Morgan v. Eckert*, *Morgan v. Bower*, 1 Dall. 295.

<sup>5</sup> *Johnston v. Coleman*, 8 W. & S. 69, and see *ante*, Chap. VI., Sect. I., *passim*.

<sup>6</sup> Per WASHINGTON, J., 4 Dall. 388.

<sup>7</sup> *Hecker v. Jarret*, 3 Binn. 404.

<sup>8</sup> *Pearce v. Affleck*, 4 Binn. 344.

<sup>9</sup> 2 Bac. Abr. 719; Bing. on Execu-

tions 256. See *Sharpe v. Speekenagle*, 3 S. & R. 463.

<sup>10</sup> 8 Johns. 361.

<sup>11</sup> Barnes 373; 2 T. R. 25.

<sup>12</sup> 2 Johns. Ca. 3; *Com. v. Sheriff*, 1 Grant 187.

<sup>13</sup> *Com. v. Sheriff*, 1 Grant 187.

<sup>14</sup> *Dowdel v. Hamm*, 2 Watts 63, ROGERS, J.

<sup>15</sup> 5 Co. 89; Ro. Abr. 94; Salk. 273, pl. 6.

appear that the sheriff knew of the latter writ, or that the deputy knew of the former.<sup>1</sup> If a jailer suffer a prisoner to escape without the sheriff's knowledge, and the sheriff is thereby made responsible, the jailer is liable to him in an action on the case, nor will it relieve the jailer from liability that he took advice and acted with good faith in the matter.<sup>2</sup> In an action against the sheriff for an escape, he cannot take advantage of the fact that the *ca. sa.* had been issued after a year and a day without a *scire facias*.<sup>3</sup> But the plaintiff's attorney has full power to discharge the defendant from imprisonment, and the sheriff is bound to receive and obey his instructions: the sheriff may therefore rely upon the fact that the attorney of the plaintiff ordered the defendant's discharge; but this fact must be clearly proved, and if it appear that the order was given after the escape it will not relieve the sheriff.<sup>4</sup> So if the plaintiff, his assignee, trustee, or agent, direct the sheriff to execute the writ in a particular way, and the sheriff obey as he is bound to do, he will be relieved from all responsibility in case of loss or escape, and the former must take the consequences.<sup>5</sup>

If the action be brought in debt, the jury must find the whole debt and costs, the plaintiff being entitled to recover them, in the same manner as he could have done against the debtor; for the insolvency of the debtor could not be given in evidence as it could if the escape had been on *mesne* process.<sup>6</sup> But if it is brought in case, they may find such damages as they think proper.<sup>7</sup>

The defendant who is alleged to have escaped is a competent witness in the action against the sheriff.<sup>8</sup>

*Return.*—The common returns to a *ca. sa.* are "C. C. and C.," that is, *cepi corpus et committitur*, when the defendant is arrested and committed to jail; and "N. E. I.," that is, *non est inventus*, when the defendant cannot be found in the bailiwick. Special returns vary according to circumstances: when the debtor has given bond for his appearance under the insolvent laws, the sheriff adds to his return, after stating the arrest, that the defendant was discharged by order of the court, or of the judge who subscribed the discharge; after which a *fi. fa.* would be irregular, though issued before final discharge by the Insolvent Court.<sup>9</sup> If the sheriff cannot serve the writ on account of some privilege enjoyed by the defendant, he makes a special return to that effect. The sheriff may be compelled, by attachment, to return the writ.<sup>10</sup> The truth of the return may be contested in an action for a false return.<sup>11</sup> The sheriff will be permitted to amend his return upon application being made in a reasonable time, and showing clearly that the return was made under a mistake of fact which from its nature might not be within his knowledge; as where he arrested a man of the same name as the real

<sup>1</sup> *Wheeler v. Hambright*, 9 S. & R. 390.

<sup>2</sup> *Duncan v. Klinefelter*, 5 Watts 141.

<sup>3</sup> 1 Salk. 273, cited 2 Burr. 1188.

<sup>4</sup> *Scott v. Seiler*, 5 Watts 235.

<sup>5</sup> *Dowdel v. Hamm*, 2 Watts 61, 63.

<sup>6</sup> *Duncan v. Klinefelter*, 5 Watts 141; *Shewel v. Fell*, 3 Yeates 17; *Ibid.*,

4 Yeates 47; *Wolverton v. Com.*, 7 S. & R. 273; 8 Mass. 373.

<sup>7</sup> *Duncan v. Klinefelter*, 5 Watts 141.

<sup>8</sup> *Scott v. Seiler*, 5 Watts 235.

<sup>9</sup> *Davis v. Sommer*, 1 Miles 397.

<sup>10</sup> See 7 Rev. L. 496.

<sup>11</sup> 1 Arch. Pr. 278.

defendant, and returned the arrest of the latter: but not when the application to amend is delayed till after suit has been brought against him for an escape and issue joined.<sup>1</sup>

He is not bound to particularize in his return the day of the arrest, and if he does so the party is not bound by it.<sup>2</sup>

The production of the defendant's body after a return of *cepi corpus*, may be enforced by attachment; to obtain which application must be made during the sheriff's term of office, or within two years after its termination.<sup>3</sup>

On the return of *non est inventus*, the plaintiff may sue out an *alias capias* into the same, or a *testatum capias* into a different, county.<sup>4</sup> The *testatum ca. sa.* is regulated by the 81st section of the Act of 16th June 1836,<sup>5</sup> which directs that if the defendant has no real or personal estate within the commonwealth, and he cannot be found in the county, it may be lawful for the plaintiff, upon affidavit of the fact to the best of his knowledge and belief, to have upon his own suggestion and *without any previous writ*, a writ of *testatum ca. sa.*, or several such writs, at the same time, into any other county or counties, which writs shall be made returnable to the court from which they issue: *Provided*, That the plaintiff shall not be allowed the costs of more than one writ, unless the court shall be satisfied that the plaintiff had sufficient cause for issuing more. The sheriff refusing or neglecting to execute and return a *testatum ca. sa.* directed to him may be amerced in the court where he ought to return it, and will also be liable to the action of the party aggrieved.<sup>6</sup> The court of the county to which a *testatum writ* of *fi. fa.* is directed has no control over it; the process is under the control of the court whence it issues, for every purpose whatever.<sup>7</sup> But the rule is different on a *testatum ca. sa.*: the sheriff arresting the defendant must commit him to the jail of his own county, not that of the county whence the writ issued, and if he take him to the latter county it seems he will be chargeable with an escape; and the debtor should make his application for a discharge under the insolvent laws to a judge or the prothonotary of the Common Pleas of the county in which he was arrested, and his bond should be conditioned for his appearance at the next term of the court of that county.<sup>8</sup>

*Proceedings subsequent to the arrest.*—Upon being arrested, the defendant has three alternatives: either to satisfy the plaintiff's claim, to give bond for his appearance at the next Insolvents' Court, or else to continue in close custody.

*Satisfaction by payment.*—So strict was the law on the subject of the sheriff's duty as to the custody of the defendant's body, that it was long before it was settled that payment to the sheriff, on a

<sup>1</sup> Scott v. Seiler, 5 Watts 235. And see *ante*, p. 874, as to the effect of the return.

<sup>2</sup> Dolan v. Briggs, 4 Binn. 500.

<sup>3</sup> See 7 Rev. L. 496.

<sup>4</sup> Bingham on Executions 225; 4 Johns. 407.

<sup>5</sup> Purd. Dig. 445, pl. 96, Pamph. L. 775.

<sup>6</sup> Act 16th June 1836, § 82, Purd. Dig. 445, pl. 97, Pamph. L. 775.

<sup>7</sup> Commonwealth v. Smith, C. P. Dauphin, 4 Phila. Rep. 419.

<sup>8</sup> Avery v. Seely, 3 W. & S. 494. The rule was formerly otherwise: Commonwealth v. Keeper, 1 Ash. 10.

*ca. sa.*, was a good payment.<sup>1</sup> Upon receiving the money the sheriff is bound to pay it over to the real and not to the nominal plaintiff, when the writ was endorsed to the use of the former: if he does not he is liable to an attachment.<sup>2</sup> The sheriff cannot release the defendant from the execution, on his giving security for the payment of the debt, and such security is void.<sup>3</sup> Nor upon his giving his negotiable note for the amount of the debt; in such case the defendant remains liable, though the officer gave him a receipt in full and returned the execution satisfied.<sup>4</sup> The officer cannot apply this writ in his hands to the satisfaction of his own debt, thereby substituting himself for the defendant; therefore, where the coroner, having a *ca. sa.* against the sheriff, to whom he was indebted, gave him a receipt in full, and engaged to settle the amount with the plaintiff, but failed to do so, this did not discharge the execution, actual payment alone being competent to produce that effect.<sup>5</sup> So, two officers cannot set off executions in their hands against each other, as such arrangement would substitute the officer for the defendant, and if one of them were insolvent and the other not, the set-off would effect an injurious change of liability.<sup>6</sup> To avoid this and other mischiefs, the law will not endure the mingling of private transactions with official duties.

The sheriff's commission on receiving and paying over money to the creditor under this process, is the same as that allowed under other executions, and subject to the same restrictions.<sup>7</sup>

*Satisfaction by discharge from custody.*—If the plaintiff direct or assent to the discharge of the defendant from arrest in execution, though it be on terms which are not subsequently fulfilled, or upon giving fresh security which afterwards becomes ineffectual, the debt is extinguished;<sup>8</sup> and the plaintiff cannot resort to the judgment again, or charge the defendant's person in execution, though he was discharged upon an express agreement that he should be liable to be retaken, in case of non-compliance with the terms.<sup>9</sup> The discharge of the defendant by the plaintiff extinguishes the judgment, and all remedy on any promise except that which formed the immediate consideration of the discharge; a subsequent promise is *nudum pactum*;<sup>10</sup> but the lien of the judgment is not discharged by an agreement to release the defendant from arrest in execution, on payment of costs and jail-fees, without prejudice to his future liability for the judgment.<sup>11</sup> If, therefore, the plaintiff discharges one of

<sup>1</sup> Sharpe v. Speckenagle, 3 S. & R. 467, per DUNCAN, J.

<sup>2</sup> Zantzinger v. Old, 2 Dallas 265.

<sup>3</sup> Dowdel v. Hamm, 2 Watts 63; 8 Johns. 98; 13 Ibid. 366.

<sup>4</sup> Bank of Orange v. Wakeman, 1 Cowen 46.

<sup>5</sup> Godwin v. Field, 9 Johns. 263. See Miles v. Richwine, 2 Rawle 200.

<sup>6</sup> Miles v. Richwine, 2 Rawle 199.

<sup>7</sup> See *ante*, p. 866 *et seq.*

<sup>8</sup> Sharpe v. Speckenagle, 3 S. & R. 464; Heisse v. Markland, 2 Rawle 274;

Jordon v. Minster, 5 P. L. J. 542; 11 Johns. 476; 2 Bac. Abr. 719; Barnes 205; 6 T. R. 527; 1 Barn. & Ald. 297.

<sup>9</sup> 5 Johns. 364; 2 East 243; Bingham on Executions 266.

<sup>10</sup> Snevily v. Read, 9 Watts 396.

<sup>11</sup> Jackson v. Knight, 4 W. & S. 412. A discharge at the defendant's "own request," (whatever that may mean), leaves matters in the same situation as if no *ca. sa.* had ever been issued. See Act 16th June 1836, § 31, Purd. Dig. 432, pl. 19, Pamph. L. 766.



several defendants in custody under a *joint capias*, he cannot retake him or take any of the others;<sup>1</sup> but where the actions against two joint debtors were separate, and they were both arrested, one for the debt and the other for the costs, it was held that the plaintiff, by discharging the defendant in execution for the costs only, did not discharge the other, and it was not a satisfaction of the debt for which the latter was imprisoned.<sup>2</sup>

But in *qui tam* actions, the plaintiff having no right to discharge the judgment, or compound with the defendant without leave of the court or payment of the judgment, the defendant's discharge, so far as relates to the moiety of the penalty belonging to the commonwealth, is void, and cannot excuse an escape.<sup>3</sup> So where a single judge discharges a defendant from execution upon a *habeas corpus*, without notice to the plaintiff, the proceeding is void, and here the defendant may be retaken in execution:<sup>4</sup> and the Supreme Court cannot discharge from a *ca. sa.* issued out of the Common Pleas.<sup>5</sup>

*Satisfaction by death of defendant.*—At common law if the defendant died in jail the plaintiff had no further remedy;<sup>6</sup> but by St. Jac. I., c. 24,<sup>7</sup> if the defendant dies while charged in execution under this writ, the plaintiff may sue out afterwards a new execution against his lands, goods, or chattels.<sup>8</sup> And now, by the Act of 16th June 1836,<sup>9</sup> if the defendant die in prison, the judgment shall not be deemed satisfied, but the plaintiff may proceed as if the *ca. sa.* had not issued, saving, nevertheless, all rights and interests which may have accrued to others between the issue of the writ and the death of the defendant.

*Discharge under the insolvent laws.*—If the defendant has resided in the State for six months, or has been confined in jail for three months,<sup>10</sup> he may make application for his discharge to any judge or to the prothonotary of the Common Pleas of the county in which he is arrested or detained:<sup>11</sup> the District Courts have no jurisdiction:<sup>12</sup> and one arrested on a *testatum ca. sa.* can only be discharged by the court of the county to which the writ is issued.<sup>13</sup> An associate judge of a state court cannot discharge, under the insolvent laws of the State, a defendant in custody upon final process from the United States courts.<sup>14</sup>

The defendant must give bond to the plaintiff (it is void if taken for the use of other creditors),<sup>15</sup> in such amount and with such security as shall be approved by the judge or prothonotary,<sup>16</sup> conditioned

<sup>1</sup> 6 T. R. 526.

<sup>2</sup> 8 Johns. 539.

<sup>3</sup> 11 Johns. 476.

<sup>4</sup> Hecker v. Jarret, 3 Binn. 411.

<sup>5</sup> Commonwealth v. Leckey, 1 Watts 66.

<sup>6</sup> Hob. 52; 6 T. R. 526.

<sup>7</sup> Rob. Dig. 246.

<sup>8</sup> Sharpe v. Speckenagle, 3 S. & R. 465.

<sup>9</sup> Sect. 31, Purd. Dig. 432, pl. 19, Pamph. L. 766.

<sup>10</sup> Act 16th June 1836, § 3, Purd. Dig. 539, pl. 11, Pamph. L. 731.

<sup>11</sup> Ibid., § 2. For Form of Petition, see Smith's Forms 413, pl. 2.

<sup>12</sup> See Sarmiento's Case, 2 Browne, Appx., 61.

<sup>13</sup> Avery v. Seely, 3 W. & S. 494. He must be committed to the jail of this county: Ibid.

<sup>14</sup> Duncan v. Klinefelter, 5 Watts 141.

<sup>15</sup> Beacom v. Holmes, 13 S. & R. 190.

<sup>16</sup> The approval by the prothonotary

that he will appear at the next term of the court, and then and there present his petition for the benefit of the insolvent laws of the State, and comply with all the requisitions of the said law, and abide all the orders of the said court in that behalf, or in default thereof and if he fail in obtaining his discharge as an insolvent debtor, that he will surrender himself to the jail of the said county.<sup>1</sup> Upon such bond being given, the judge or prothonotary may make an order directing the officer or other person having the defendant in custody or confinement, forthwith to discharge such defendant on his paying the jail-fees, if any be due.<sup>2</sup> The officer or jailer will be exonerated on making a return of such order upon the execution.<sup>3</sup> And he is bound to comply with the order of discharge, whether the bond be legal or not.<sup>4</sup>

The conditions of the bond must be strictly complied with or it is forfeited, and a second execution may issue against the defendant, or the plaintiff may proceed against the bail. Thus, the defendant must present his petition at the very next term of the court at which it can possibly be done;<sup>5</sup> it is not sufficient to present it at an adjourned court, after the regular term is ended.<sup>6</sup> But any time during the term is sufficient.<sup>7</sup> And it may be presented to the current term of the court,<sup>8</sup> or to an adjourned court before the next regular term.<sup>9</sup> The pendency of an application in another suit, will excuse the defendant from making a second application;<sup>10</sup> so if the application be pending in another county.<sup>11</sup> So will a pending application, subsequently granted, made to the United States court for the benefit of the bankrupt law.<sup>12</sup> And if the court, at the next term, set aside the *ca. sa.*, the bond is not forfeited by a failure on the part of the defendant to present his petition, but became inoperative when the process was set aside.<sup>13</sup> In Philadelphia, notice of application for the benefit of the insolvent laws must be published in the Legal Intelligencer.<sup>14</sup> Where the defendant has forfeited his bond by non-compliance with the conditions, and has been rearrested under a second writ, if the plaintiff discharge him from custody without the assent of the surety the debt is satisfied, and no action can be maintained against the surety upon the bond.<sup>15</sup>

If the application is rejected, the defendant, in order to relieve his surety, must surrender himself upon the day of his rejection; a subsequent surrender is ineffectual, and an escape from it would

is for the benefit of creditors, and where it had been done by the deputy they may waive the defect and maintain an action: *Wells v. Bentley*, 3 Barr 324.

<sup>1</sup> Act 16th June 1836, § 6, *Purd.* Dig. 539, pl. 14, *Pamph. L.* 731. For Form of Bond see *Sm. Forms* 414, pl. 4.

<sup>2</sup> *Ibid.*, §§ 4 & 5. See Form of Order, *Smith's Forms* 414, pl. 3.

<sup>3</sup> *Ibid.*, § 7.

<sup>4</sup> *Frick v. Kitchen*, 4 W. & S. 80.

<sup>5</sup> See *Waln v. Shearman*, 8 S. & R. 367; *Lincoln v. Williams*, 12 S. & R. 105; *McDonough's Case*, 1 Wright 275. For Form of Petition see *Smith's Forms*

415, pl. 5.

<sup>6</sup> *Horton v. Miller*, 2 Wright 270.

<sup>7</sup> *Baillie v. Wallace*, 10 Watts 228.

<sup>8</sup> *McClure v. Foreman*, 4 W. & S. 280; *Johnson v. Turner*, 2 Ash. 433.

<sup>9</sup> *Johnson v. Turner*, 4 W. & S. 465.

<sup>10</sup> *McClure v. Foreman*, 4 W. & S. 279.

<sup>11</sup> *Caldcleugh v. Carey*, 5 W. & S. 155.

<sup>12</sup> *Nesbit v. Greaves*, 6 W. & S. 120.

<sup>13</sup> *Mason v. Benson*, 9 Watts 287.

<sup>14</sup> *In re Remington*, C. P. Phila., 3 Phila. Re. 435.

<sup>15</sup> *Palet. orpe v. Leshner*, 2 Rawle 272.

not charge the sheriff with the debt.<sup>1</sup> The surrender may be made to the sheriff.<sup>2</sup> An offer by the defendant in open court to surrender himself, and his afterwards going to and remaining in prison, will discharge his surety, and his subsequent release does not revive the liability of his surety.<sup>3</sup> But his voluntary surrender of himself will not excuse him from presenting his petition in accordance with the conditions of his bond, and his surety will not be discharged thereby.<sup>4</sup> And if the petition be rejected because the accompanying affidavit was taken by the prothonotary, who had no power to administer the oath, and he is immediately surrendered to jail, his bond is forfeited.<sup>5</sup>

Where the defendant gave bond, and his application was rejected, whereupon he surrendered himself in discharge of his bail, and while in custody executed another bond to the same plaintiff, which was approved by a judge of the court, and he was discharged, and his application was again rejected—though the second bond was illegal, yet in an action upon it the defendants were estopped from asserting its illegality, and the plaintiff was entitled to recover.<sup>6</sup> So where a privileged person was arrested and gave bond, which he forfeited, he cannot set up in an action on the bond that his arrest was illegal, and the bond void.<sup>7</sup> Nor can his surety on the bond plead the illegality of the arrest.<sup>8</sup>

Where a time has been fixed by the court for hearing the petitioner and his creditors, the petitioner, if he would save his bond, must either ask for a discharge, surrender himself to jail, or procure another day for final hearing; if the court discharge a prisoner who has not performed one of these alternatives it is erroneous, and will be reversed on *certiorari*.<sup>9</sup> Where, by mistake, no hearing was fixed, it was the duty of the debtor to appear at the next term, and have a day for hearing appointed; where no proceedings were had after presenting the petition, the bond is forfeited.<sup>10</sup>

The discharge is matter of record, and should be pleaded *prout patet per recordum*; <sup>11</sup> it can be proved only by the record, or by parol to supply a loss, but unless the existence of the record be first shown, other evidence is inadmissible.<sup>12</sup>

It would be foreign to the subject of this work to explain at length the proceedings upon the application for the benefit of the Insolvent Laws. They may be found in Ingraham on Insolvency.

*Discharge under the Bread Act.*—By the 19th section of the Act of 26th March 1814,<sup>13</sup> commonly called the Bread Act, the Courts of Common Pleas are authorized to fix a daily allowance for such defendants in the county prison as have not property sufficient

<sup>1</sup> Frick v. Kitchen, 4 W. & S. 30.

<sup>2</sup> Rannington v. Bennett, D. C. Phila., 3 Phila. Rep. 343.

<sup>3</sup> Mullen v. Wallace, 2 Grant 389.

<sup>4</sup> Wolfram v. Strickhouser, 1 W. & S. 379.

<sup>5</sup> Detwiler v. Casselberry, 5 W. & S. 179.

<sup>6</sup> Egbert v. Darr, 3 W. & S. 517.

<sup>7</sup> Winder v. Smith, 6 W. & S. 424.

<sup>8</sup> Johnston v. Coleman, 8 W. & S. 69.

<sup>9</sup> McDonough's Case, 1 Wright 275.

<sup>10</sup> Bartholomew v. Bartholomew, 14 Wright 194.

<sup>11</sup> Murphy v. Richards, 5 W. & S. 279.

<sup>12</sup> Loughry v. McCullough, 1 Barr 503; Karch v. Com., 3 Barr 269.

<sup>13</sup> Purd. Dig. 538, pl. 5; 6 Sm. Laws 201.

to support themselves, and the plaintiff, his agent or attorney, upon notice from the jailer, must cause the said allowance to be paid at the prison on every Monday morning, while the debtor continues in prison; on failure whereof for three days, the debtor may apply to the Common Pleas, or to a judge thereof, if the court is not in session,<sup>1</sup> who, if it be found on inquiry that the debtor is unable to support himself, and that payment of his allowance has not been made, shall forthwith discharge the debtor from imprisonment, and he shall not be again imprisoned for the same debt. And now the prothonotary of the Common Pleas may discharge the defendant in such case.<sup>2</sup> But the District Courts have no such jurisdiction.<sup>3</sup> One imprisoned for damages *in tort* is not within the act.<sup>4</sup> Such discharge cannot be impeached collaterally by proof that at the time of his discharge the defendant was in possession of a sufficient sum of money to pay the debt.<sup>5</sup> A discharge under the Bread Act merely prevents another arrest of the defendant for the same debt; while a discharge under the Insolvent Laws secures the person of the debtor from arrest under any other process upon a claim accruing prior to such discharge.<sup>6</sup>

*Imprisonment.*—The defendant may, if he chooses, adopt the third of the alternatives above mentioned, and remain in prison. In all cases of imprisonment for debt the debtor is protected by legislation from oppression or extortion on the part of sheriffs, undersheriffs, and jailers.<sup>7</sup> And the plaintiff is liable for the debtor's boarding and jailer's fees from the time of the commitment, if such debtor makes affidavit that he is unable to support himself, which may be recovered by the sheriff or jailer in the manner in which debts of like amount are recoverable by law.<sup>8</sup>

*Effect of arrest under a ca. sa.*—Where the body of the defendant has been taken in execution, this, during the confinement, amounts to a discharge of the debt,<sup>9</sup> and the plaintiff can never have against him, while in jail, any other execution. And the plaintiff by arresting the defendant relinquishes his lien on the defendant's lands; and if they are sold under other executions, and afterwards the defendant is discharged under the Insolvent Laws, the plaintiff cannot resort to the land, nor has he any claim to any part of the purchase-money.<sup>10</sup>

<sup>1</sup> See Form of Application, Sm. Forms 412, pl. 1.

<sup>2</sup> Act 30th March 1833, § 1, Purd. Dig. 539, pl. 6, Pamph. L. 107.

<sup>3</sup> Com. v. Sheriff, &c., 6 Barr 445.

<sup>4</sup> Ibid.

<sup>5</sup> McKinney v. Crawford, 8 S. & R. 351.

<sup>6</sup> Act 16th June 1836, § 15, Purd. Dig. 540, pl. 23, Pamph. L. 733. An exception however is made where the defendant is not a resident of the county in which he is imprisoned, in which case he is only protected from another arrest at the suit of the same plaintiff: Act 16th June 1836, § 32, Purd. Dig. 542, pl. 40, Pamph. L. 737.

And a discharge under the Insolvent Laws of Pennsylvania, does not protect the defendant from arrest under a *ca. sa.* at the suit of the United States, under the Act of Congress of 28th Feb. 1839: The United States v. Hewes, 2 Am. L. J. 204.

<sup>7</sup> Act 14th February 1729-30, §§ 14, 15, 18, 19, Purd. Dig. 538, 1 Sm. Laws 186.

<sup>8</sup> Act 16th July 1842, § 11, Purd. Dig. 539, pl. 7, Pamph. L. 395.

<sup>9</sup> Sharpe v. Speckenagle, 3 S. & R. 465, 466.

<sup>10</sup> Freeman v. Ruston, 4 Dallas 217. See Sharpe v. Speckenagle, 3 S. & R. 466.

But the arrest on a *ca. sa.* is in itself no satisfaction of the debt;<sup>1</sup> for if two persons are bound in an obligation jointly and severally, and sued severally, each may be taken in execution, or one may be taken under a *ca. sa.*, and the property of the other may be levied on by a *fi. fa.*, which could not be if the debt was satisfied by taking one in execution; for there can be but one satisfaction for one debt, although one hundred persons are bound for it; but if one makes actual satisfaction by payment of the money, all the rest are discharged. And although a defendant be taken in execution, yet the debt may still become the subject of a set-off in a cross-action;<sup>2</sup> for under the Defalcation Act of Pennsylvania, though silent on the subject, the setting off of one judgment against another has always been permitted.<sup>3</sup> There is a difference, therefore, between actual satisfaction and that kind of legal satisfaction which arises from an arrest under a *ca. sa.*

And a discharge under the Insolvent Laws, being the act of the law, does not discharge the debtor from the debt, but only from the imprisonment;<sup>4</sup> nor does it discharge his surety for stay of execution;<sup>5</sup> nor does such discharge of one of many debtors, taken under a joint *capias*, affect the others.<sup>6</sup> But if the plaintiff consented to the discharge the debt itself is gone;<sup>7</sup> and after having discharged one of the defendants, who had been taken under a joint *capias*, he cannot afterwards retake such defendant, or take any of the others.<sup>8</sup>

## SECTION VI.

## OF CERTAIN PECULIAR KINDS OF EXECUTION.

1. *Testatum fieri facias*.—At common law, when the defendant had no goods in the bailiwick, and the sheriff returned *nulla bona* to the *fieri facias*, the plaintiff might have had a *testatum fieri facias* into a different county, suggesting that the defendant had goods there: and a *testatum fieri facias* might be either for the whole, or, on a return of a partial levy, for the residue.<sup>9</sup> The preliminary *fi. fa.* is very much a matter of form. Hence it is not error that a *fi. fa.*, issued in order to found a *testatum*, was returned N. E. I. instead of *nulla bona*.<sup>10</sup> And where judgment was entered on November 14th, a *testatum fi. fa.*, tested on the second return day of September Term, returnable on the last return day of December Term following, and founded on a *fi. fa.* not actually issued but only marked on the docket, was held good.<sup>11</sup> But where a verdict for plaintiff was obtained four days before the term, and by consent of

<sup>1</sup> See *Hunt v. McClure*, 2 Yeates 387.

<sup>2</sup> 1 M. & S. 696; and see 1 Taunt. 426; 6 Taunt. 176. But *contra*, 5 M. & S. 103; 2 Chit. Rep. 303, s. c.

<sup>3</sup> *Dunkin v. Calbraith*, 1 Browne 48; *Ferree v. Meily*, 3 Yeates 153. *Ante*, 463, *et seq.*

<sup>4</sup> *Sharpe v. Speckenagle*, 3 S. & R. 404.

<sup>5</sup> *Ibid.*

<sup>6</sup> 2 Bac. Abr. 719; *Bingh. on Executions* 266.

<sup>7</sup> *Sharpe v. Speckenagle*, 3 S. & R. 464.

<sup>8</sup> 6 T. R. 526.

<sup>9</sup> *Tidd Pr.* 1022.

<sup>10</sup> *McCormick v. Meason*, 1 S. & R. 92.

<sup>11</sup> *Maybury v. Jones*, 4 Yeates 21.

the defendant a *testatum* issued tested the first day of the term and returnable to the next term, it was doubted whether this would be valid as against other execution-creditors.<sup>1</sup> Where, in the Supreme Court, the venue was laid in one county, it was error to issue a *fi. fa.* directly into another county, and such writ was quashed; the proper course was to issue a *fi. fa.* into the county where the venue was laid, have it returned *nulla bona*, and then issue a *testatum* into the other county.<sup>2</sup>

Now, by the Act of 16th June 1836, § 76, a *testatum fieri facias* may issue when the defendant has no real or personal estate in the county where the judgment was obtained, upon the plaintiff's suggestion of that fact, verified by affidavit, without any previous writ.<sup>3</sup> The form of such suggestion and affidavit is given by Smith.<sup>4</sup> Where a *fi. fa.* has issued and been returned *nulla bona*, it is unnecessary to file a suggestion.<sup>5</sup> If the estate of the defendant, in the county to which the *testatum fi. fa.* first issues, be insufficient, the plaintiff may in like manner have an *alias* or *pluries* writ into any other county until the judgment is satisfied.<sup>6</sup>

The *testatum fi. fa.* is directed to the sheriff or coroner of the county where the defendant's property lies, and is returnable to the court from which it issues.<sup>7</sup> The officer immediately on receiving the writ must deliver it to the prothonotary of the Court of Common Pleas of his county,<sup>8</sup> who must forthwith enter it in a docket to be provided for the purpose, and as of the preceding term, stating particularly the amount of the debt or damages, and costs endorsed upon the writ, and redeliver it to the officer to be by him executed.<sup>9</sup> If the officer refuse or neglect to execute and return the writ, he shall be amerced in the court to which it is returnable, and be liable to an action by the aggrieved party.<sup>10</sup>

Where the sheriff executed the writ, endorsed his return on it, and placed it in the post-office, directed to the prothonotary of the court to which it was returnable, but it was not received; the court ordered a duplicate writ to issue *nunc pro tunc*.<sup>11</sup> The court of the county to which the writ is directed has no power to stay execution; the process is under the control of the court whence it issues for every purpose.<sup>12</sup>

The manner in which a sheriff's deed is acknowledged in the case of a sale under a *testatum* execution is explained elsewhere.<sup>13</sup>

Where a new county has been separated from an old one, a sale of lands in the new county by the sheriff of the old one, under a judgment obtained before the separation, was irregular and void; the proper course was by a *testatum fi. fa.*, directed to the sheriff

<sup>1</sup> Cochran v. Cummins, 4 Yeates 136.

<sup>2</sup> Leshner v. Gehr, 1 Dallas 330.

<sup>3</sup> Purd. Dig. 445, pl. 91, Pamph. L. 775.

<sup>4</sup> Smith's Forms 383, pl. 32.

<sup>5</sup> Boyer v. Kimber, 2 Miles 393.

<sup>6</sup> Act 16th June 1836, § 77, Purd. Dig. 445, pl. 92, Pamph. L. 775.

<sup>7</sup> Act 16th June 1836, § 76, *ubi supra*.

<sup>8</sup> Ibid., § 78, Purd. Dig. 445, pl. 93.

<sup>9</sup> Ibid., § 79. For this he is allowed a fee of fifty cents: Act 1st April 1823, § 2, Purd. Dig. 445, pl. 99, 8 Sm. Laws 175.

<sup>10</sup> Ibid., § 82.

<sup>11</sup> Clark v. Field, 1 Miles 244.

<sup>12</sup> Commonwealth v. Smith, C. P. Dauphin, 4 Phila. Rep. 419. See Batdorf v. Focht, 8 Wright 195.

<sup>13</sup> See *ante*, p. 1021-2.

of the new county.<sup>1</sup> In such case the lien upon the lands in the new county was created by the judgment in the old county, not by the *testatum*; and if the judgment has been regularly revived by *sci. fa.* in the old county, its lien is not affected by the lapse of five years from the entry of the *testatum* in the new county: the *testatum* could have no effect to create or continue the lien of such judgment.<sup>2</sup>

The lien of the writ continues for five years from the date of its entry in the docket, as above mentioned, upon the real estate of the defendant within the county, unless the debt or damages and costs be sooner paid.<sup>3</sup> The lien of the *testatum* execution is an independent one only because the lien of the judgment is limited to lands in the county where it was obtained; but it is regulated by a separate act, and depends on considerations different from those which regulate the lien of judgments.<sup>4</sup> The act only applies where the *testatum* is issued for the purpose of creating the lien, not where it is merely used as a means of selling the land; and where the lien is not created by the *testatum* it is not affected by the lapse of five years from its entry.<sup>5</sup>

Since the Act of 1834<sup>6</sup> a *testatum fi. fa.*, on a judgment against administrators, will not bind the decedent's lands in another county without a previous *scire facias* against the widow and heirs.<sup>7</sup>

The lien of the *testatum* upon defendant's goods is not postponed to subsequent executions by reason of a judicial order in the county where it originated, staying it until a rule taken by defendant should be disposed of, though there was in the order staying the writ no stipulation that its lien should remain.<sup>8</sup>

*Satisfaction.*—Upon payment being made, the plaintiff is bound to enter satisfaction in the same manner and under the same penalties as are required in the case of judgments.<sup>9</sup>

2. *Fi. fa. on a judgment transferred to another county.*—By the Act of 16th April 1840,<sup>10</sup> judgments obtained in any Court of Common Pleas or District Court, or entered in any Court of Common Pleas by transcript from a justice of the peace, may be transferred to the Common Pleas or District Court of any other county by filing of record in such other court a certified copy of the whole record in the case, and the prothonotary, after filing the copy, must transcribe the docket entry into his own docket, and the case may then be proceeded in, and the judgment and costs collected by execution, attachment, or bill of discovery; and the judgment thus

<sup>1</sup> King v. Carter, 1 Barr 147.

<sup>2</sup> West's Appeal, 5 Watts 87.

<sup>3</sup> Act 16th June 1836, § 80, Purd. Dig. 445, pl. 95, Pamph. L. 776.

<sup>4</sup> Jameson's Appeal, 6 Barr 280.

<sup>5</sup> West's Appeal, 5 Watts 87. This was decided under the Act of 1823, which was almost identical with the Act of 1836.

<sup>6</sup> Act 24th February 1834, § 34, Purd. Dig. 288, pl. 100, Pamph. L. 79.

<sup>7</sup> McLaughlin v. McCumber, 12 Casey

14. See Gray's Heirs v. Coulter, 4 Barr 188.

<sup>8</sup> Batdorff v. Focht, 8 Wright 195.

<sup>9</sup> Act 1st April 1823, § 1, Purd. Dig. 445, pl. 98, 8 Sm. Laws 175.

<sup>10</sup> Purd. Dig. 574, pl. 16, Pamph. L. 410. This provision was subsequently extended to judgments obtained in Philadelphia in the Supreme Court for the Eastern District, by Act 2d April 1841, § 11, Purd. Dig. 574, pl. 17, Pamph. L. 142.

transferred has the same effect as to lien, revival, executions, and so forth, as if it had been originally entered in the court to which it is transferred. The lien of the original judgment is not impaired by the transfer.<sup>1</sup> Where a party to the judgment has died, the transfer may be made either before or after the substitution of his legal representatives, and if before, the substitution may be effected in the new forum, which shall then proceed as if the judgment had been originally entered there.<sup>2</sup>

Under these acts the whole record must be certified; it is not sufficient to certify the docket-entries only.<sup>3</sup> And execution on the transferred judgment will be set aside if it be shown to the court that the whole record was not certified, and that proceedings were pending and undetermined in the county where the judgment was obtained.<sup>4</sup> Where the plaintiff is dead and there is no administrator, the transfer may be made by a creditor to secure assets, and, it seems, by an heir under similar circumstances.<sup>5</sup>

An award of arbitrators cannot be transferred before the expiration of the twenty days allowed for an appeal.<sup>6</sup>

The transfer of a judgment under the Act of 1840 is made either for the sake of acquiring a lien upon the defendant's lands in the county to which the transfer is made, or in order to issue execution in such county, and for this last purpose it has almost entirely superseded the *testatum* execution.

By the Act of 4th April 1843, § 7,<sup>7</sup> the transfer is not to impair the validity of the original judgment, nor of any judgment in the county to which the transfer is made. And by the Act of 1840 the transferred judgment is to have the same force and effect, and no other, as to lien, revivals, executions, and so forth, as if it had been originally entered in the county to which it has been transferred. Such transfer creates a lien from its date, but does not carry with it the lien of the original judgment.<sup>8</sup> The lien continues for the full period of five years from the date of the entry.<sup>9</sup> And if the original judgment be set aside for irregularity, the transferred judgment falls with it, and a new judgment obtained in the original case is not, without a new transfer, a lien in the county to which the transfer had been formerly made.<sup>10</sup> The reason of this is, that the transferred judgment is not a judgment for all purposes; it is only a *quasi* judgment, though it is evidence of the existence of a judgment in the original court.<sup>11</sup> The original court has control over the judgment, and can alone take action operating on the judgment

<sup>1</sup> Act 4th April 1843, § 7, Purd. Dig. 574, pl. 18, Pamph. L. 132.

<sup>2</sup> Act 6th April 1845, § 11, Purd. Dig. 574, pl. 19, Pamph. L. 540. And see the Resolution of April 16th 1845, Purd. Dig. 574, pl. 19, Pamph. L. 558, and the Act of 24th January 1849, Purd. Dig. 574, pl. 20, Pamph. L. 676, for provisions protecting liens and interests vested prior to the Act of 6th April 1845.

<sup>3</sup> Updegraff v. Perry, 4 Barr 291. See Bank of Chester Co. v. Olwine, 6

P. L. J. 154; Brandt's Appeal, 4 Harris 346.

<sup>4</sup> Bank of Chester Co. v. Olwine, 6 P. L. J. 154.

<sup>5</sup> Walt v. Swinehart, 8 Barr 97.

<sup>6</sup> Hallman's Appeal, 6 Harris 310.

<sup>7</sup> Purd. Dig. 574, pl. 18, Pamph. L. 132.

<sup>8</sup> Hays's Appeal, 8 Barr 182.

<sup>9</sup> Knauss's Appeal, 13 Wright 419.

<sup>10</sup> Brandt's Appeal, 4 Harris 343.

<sup>11</sup> Ibid.



itself. It may direct satisfaction to be entered upon payment of the money into court, and thereupon further process upon the transferred judgment must cease, except for its own costs. But the original court cannot control an execution issued on the transferred judgment, and a stay of execution granted in the former county does not affect execution process issued out of the county to which the transfer is made.<sup>1</sup>

The transferred judgment is not an original from which a second transfer may be made to another county: if this is done, such second transferred judgment will be stricken off on motion.<sup>2</sup>

On the other hand, if the judgment is duly certified, the court to which it is transferred has no power over it, except for purposes of execution and satisfaction; it cannot set it aside, or take any action operating upon the judgment itself; it cannot inquire into its merits at all, but is restricted to the enforcement of it.<sup>3</sup>

The process in executions under transferred judgments does not differ in any respect from that in ordinary cases. The Act of 1840 prescribes that the judgment and costs may be collected by executions, bill of discovery, or attachment, as prescribed by the act relating to executions.<sup>4</sup> A sequestration may issue on a transferred judgment against a corporation.<sup>5</sup>

3. *Execution against a tract lying in two counties.*—When any part of lands, which lie in one or more adjoining tracts, in different counties, is taken in execution under a *fiery facias* or a *levari facias*, issued out of any court in either county, the sheriff must summon an inquest to ascertain whether the part taken in execution can be sold separately from the other part lying in the adjoining county, without prejudice to the whole, or to the interest of the defendant, or of any of his lien-creditors, or of any other person interested in the proceeds; and also to ascertain how much and what part of the land in the adjoining county ought to be sold with that part taken in execution, describing it by metes and bounds.<sup>6</sup> A form of inquisition in such case is given by Smith.<sup>7</sup> The inquest is not to ascertain whether that part of the tract which lies beyond the sheriff's bailiwick can be sold separately from that within it, without prejudice to the whole, but whether the part taken in execution, situate within the sheriff's bailiwick, can be sold separately.<sup>8</sup> The sheriff must duly return the inquisition, with the writ; and if the inquest find that the part levied on cannot be sold separately from the other part lying in the adjoining county, or a portion thereof, without prejudice as aforesaid, and the inquisition shall be approved by the court, the plaintiff may have a *vend. exp.* or a *lev. fa.*, &c., to sell the part levied on, and the other part described in the inquisition:

<sup>1</sup> Baker v. King, 2 Grant 254; King v. Nimick, 10 Casey 297.

<sup>2</sup> Mellon v. Guthrie, S. Ct., 23 Leg. Int. 76.

<sup>3</sup> Brandt's Appeal, 4 Harris 346; Baker v. King, 2 Grant 254; King v. Nimick, 10 Casey 297.

<sup>4</sup> Act 16th June 1836, Purd. Dig., tit. "Execution," 431, Pamph. L. 761,

*et seq.*

<sup>5</sup> Reid v. N. W. Railroad Co., 8 Casey 257.

<sup>6</sup> Act 13th June 1840, § 12, Purd. Dig. 444, pl. 87, Pamph. L. 692.

<sup>7</sup> Smith's Forms 383, pl. 31.

<sup>8</sup> Worthington v. Worthington, 5 P. L. J. 74.

the land shall be exposed to sale, sold, and conveyed as in other cases, and the purchaser shall take, hold, and enjoy the same as if it were situated wholly in the county in which the writ issued.<sup>1</sup> The approval of the inquisition by the court cures prior irregularities, and the *vend. exp.* may issue.<sup>2</sup> To entitle the inquisition to the approval of the court they require that notice be given to the defendant of the time and place of holding the inquisition, according to the 46th section of the Act of 16th June 1836;<sup>3</sup> and an affidavit be filed.<sup>4</sup> If the defendant demand it, the inquisition must be held on the premises according to the 47th section of the same act.<sup>5</sup> In the District Court of Philadelphia the motion to approve the inquisition cannot be made before the Saturday succeeding the return day of the writ, when, if it is regular, and no exceptions have been filed, it will be approved.<sup>6</sup>

Upon the return of the inquisition, the plaintiff must file in the office of the prothonotary of such adjoining county a copy of the docket-entry, and the whole proceeding connected with the writ, which is to be entered on the records of such office, and from the date of such entry the judgment becomes a lien on the lands in such county; and copies of all subsequent proceedings must in like manner be filed and entered in the office of such prothonotary immediately after the sheriff has returned a sale of the premises; notice of the sale must be given in each county in the manner required in ordinary cases of sheriff's sales.<sup>7</sup> It is not necessary for the plaintiff to file the docket-entry and proceedings in the adjoining county before suing out the *vend. exp.*, nor will his omission to do so destroy the jurisdiction of the court; nor will his omission to enter in the adjoining county a copy of the proceedings subsequent to the inquisition vitiate the sale, though it may affect his lien.<sup>8</sup>

If there are liens against the part of the land lying in the adjoining county existing previous to filing and entering the proceedings, the court, after the return of the sale, is to ascertain and determine in such manner as they may think proper what proportion of the proceeds is to be applied in satisfaction of such previous liens.<sup>9</sup>

In case one or more liens shall be claimed to exist against such real estate, the Court of Common Pleas of the county in which the first sale is made, or in case a special court shall be necessary, then the president judge of any district adjoining the same, shall have jurisdiction to decree distribution of the whole of the funds so raised by the said sales: *Provided*, That in case of a special court, as aforesaid, the said judge holding the same, before making the final decree of distribution, shall try all the necessary issues in fact in the proper county where the said issues may be formed.<sup>10</sup>

<sup>1</sup> Act 13th June 1840, § 12, *supra*.

<sup>2</sup> Hibberd v. Bovier, 1 Grant 266.

<sup>3</sup> Purd. Dig. 440, pl. 54, Pamph. L. 769. See *ante*, p. 982.

<sup>4</sup> Worthington v. Worthington, 5 P. L. J. 74.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Act 13th June 1840, § 12, Purd. Dig. 444, pl. 87.

<sup>8</sup> Elliott v. McGowan, 10 Harris 198.

<sup>9</sup> Act 13th June 1840, § 12.

<sup>10</sup> Act 13th April 1843, § 9, Purd. Dig. 445, pl. 90, Pamph. L. 235.

4. *Execution upon judgments whose lien is restricted to a particular tract.*—*Levari facias.*—A general judgment binds the whole of defendant's lands in the jurisdiction; though it may be restricted to particular lands by agreement of parties, and such agreements will be enforced by the courts by staying or setting aside executions issued or levied in contravention of them. But a stipulation of this kind in a bond and warrant of attorney, though it restricts the lien of the judgment, does not exempt the other real and personal property of the defendant from liability for the debt; the lien is but an incident to the judgment, and a restriction of it to certain designated lands does not affect the judgment as a personal security.<sup>1</sup> And an unconditional revival of a restricted judgment during defendant's lifetime makes it general.<sup>2</sup> But a revival against his administrators could not have this effect; yet as a debt of decedent it is a lien on his lands.<sup>3</sup>

There are, however, judgments which from their nature only affect particular lands of the defendant. Such are judgments in real actions, generally speaking, and in *scire facias* upon mechanic's liens, municipal claims, and mortgages. But a judgment on the bond accompanying a mortgage is general, and execution is not restricted to the mortgaged premises.<sup>4</sup>

The executions in real actions, and the proceedings in the several species of *scire facias* down to the entry of judgment, will be treated in detail under their appropriate heads in our second volume. We have here only to explain the practice in executions upon judgments obtained in the writs of *scire facias* just mentioned.

*Levari facias.*—The writ employed in such cases is the *levari facias*, which, in the case of mortgages, has been used since the Act of 1705;<sup>5</sup> in mechanics' claims is authorized by the Mechanics' Lien Law;<sup>6</sup> and in municipal claims and taxes in Philadelphia has grown up in practice under the various acts since that of 1824,<sup>7</sup> and is recognised in the Act of 11th March 1846.<sup>8</sup>

This is a common-law writ, and issued in England at the suit of a private person against the goods and chattels and profits of the lands of the defendant, but not against the lands themselves,<sup>9</sup> though the writ says *de terris et catallis*.<sup>10</sup> At the suit of the king the *levari facias* was employed where the land was the debtor, though even in such case the debt was levied of the profits only.<sup>11</sup>

Here the writ is employed in the latter case, where the land is the debtor, but under our statutes authorizing the sale of lands in execution, its power is enlarged, and it is used to sell the lands absolutely.

<sup>1</sup> *Stanton v. White*, 8 Casey 358.

<sup>2</sup> *Dean's Appeal*, 11 Casey 405.

<sup>3</sup> *McMurray's Administrator v. Hopper*, 7 Wright 471.

<sup>4</sup> *Morris's Executors v. McConaughy's Executors*, 1 Yeates 9, 12.

<sup>5</sup> Sect. 6, *Purd. Dig.* 328, pl. 112, 1 Sm. Laws 59.

<sup>6</sup> Act 16th June 1836, § 21, *Purd.*

*Dig.* 712, pl. 30, *Pamph. L.* 700.

<sup>7</sup> Act 3d February 1824, 8 Sm. Laws 192.

<sup>8</sup> Sect. 5, *Purd. Dig.* 752, pl. 31, *Pamph. L.* 115.

<sup>9</sup> *Com. Dig.* "Execution" C., (1), (2), (3).

<sup>10</sup> *Ibid.*, *Plowd. Com.*, 441 a.

<sup>11</sup> See *Tidd* 1042-3.

It differs from the *feri facias* against real estate in the following particulars: 1. It is used only where the land is the debtor, where the proceeding is *in rem*. 2. No inquisition or condemnation is necessary, but the land may be sold immediately. 3. The exemption of \$300 in favor of defendants does not apply as against plaintiffs in *levari facias*, though such claim may be enforced against the fund in preference to liens of judgments and other executions.<sup>1</sup>

*Form of the writ.*—It commands the sheriff to *cause to be levied* of the described property the amount of the judgment, interest, and costs. The *lev. fa.*, under the Mechanics' Lien Law, may embrace several judgments at the suit of different plaintiffs against the property.<sup>2</sup>

The *levari facias* should follow the judgment; hence, where a mortgage embraces several parcels of land, a *levari* directing the sale of only one was held to be erroneous and irregular.<sup>4</sup> So a sale under a *levari facias*, issued on an amicable confession of judgment, which contains no description of the mortgaged property, is void, and passes no title.<sup>4</sup>

Where the writ states only the amount of the debt, and interest on the mortgage from the time it was due, instead of interest to the date of the judgment, and interest thereafter on the aggregate, the error is amendable.<sup>5</sup>

An omission in the writ of the command to levy the debt is a clerical mistake which, like similar ones in other writs of execution, is amendable by the court above after error brought; but the defendant in error must pay the costs of the amendment and execution.<sup>6</sup>

*When it issues.*—It is in general governed by the same rules as other executions.

It cannot be resorted to on a mortgage, after a sale of the mortgaged premises has been effected under a judgment on the accompanying bond.<sup>7</sup>

*What may be levied on.*—In general the sheriff is governed by the description of the property in the writ. He cannot sell grain growing on the mortgaged premises.<sup>8</sup> Where a life estate is liable for the debt, as sometimes occurs in proceedings on mechanics' liens, the Act of 14th October 1840, relating to the sequestration of life estates, applies.<sup>9</sup>

<sup>1</sup> As to mortgages, see McAuley's Appeal, 11 Casey 209; Morgan v. Noud, D. C. Phila., 1 Phila. Rep. 250; Gangwere's Appeal, 12 Casey 466: as to mechanics' claims see Lauck's Appeal, 12 Harris 426; as to municipal claims and taxes it is inferable from Act 9th April 1849, § 2, Purd. Dig. 433, pl. 21. The ground seems to be that the land has been expressly made responsible for the debt, by the defendant's own act in the case of a mortgage, by legislative enactment in the cases of mechanics' liens and municipal claims, and its owner cannot be allowed to set up a claim, though legal in itself,

which would detract from the value of such security.

<sup>2</sup> See the Form, Act 16th June, § 21, Purd. Dig. 712, pl. 30, Pamph. L. 700.

<sup>3</sup> Stuckert v. Ellis, 2 Miles 433.

<sup>4</sup> Wilson v. McCullough, 7 Harris 77.

<sup>5</sup> Mohn v. Heister, 1 Rawle 53.

<sup>6</sup> Peddle v. Hollinshead, 9 S. & R. 284.

<sup>7</sup> McCall v. Lenox, 9 S. & R. 304-5. See Scott v. Israel, 2 Binn. 146.

<sup>8</sup> Myers v. White, 1 Rawle 353.

<sup>9</sup> Pentland v. Kelly, 6 W. & S. 483. As to proceedings in execution against life estates, see *post* 7, p. 1150.

*Sale.*—The 4th section of the Act of 1705, applied to executions generally, but now obsolete except as to *levari facias* upon a mortgage, requires the sheriff, before the sale, to “cause so many writings to be made upon parchment, or good paper, as the debtor or defendant shall reasonably desire or request, or so many without such request as may be sufficient to signify and give notice of such sales or vendues, and of the day and hour when and of the place where the same will be, and what lands or tenements are to be sold, and where they lie, which notice shall be given to the defendant, and the said parchments or papers shall be fixed by the sheriff or other officer in the most public places of the county or city, at least ten days before the sale.”<sup>1</sup> It has been decided that the ten days’ notice to which the defendant is entitled under this act, need not be a written or printed one.<sup>2</sup> The notice is in practice seldom, in fact, given to the defendant, but an advertisement is usually posted by the sheriff on the premises advertised for sale. It is not necessary that the notice should appear upon the return to the *levari facias*: and on the trial of an ejectment the fact of notice is not necessary to be proved by the party insisting on the validity of the sale, unless evidence be given to raise a presumption that such notice has not been given: in such cases it is presumed that the sheriff has performed his duty, unless the reverse appears.<sup>3</sup>

In writs of *levari facias* upon municipal claims, the sheriff’s handbills and advertisements must contain at the foot a memorandum setting forth the name of the party plaintiff, and the nature and character of the claim: in default of this the sale may be set aside by the court.<sup>4</sup> Such sales in Philadelphia can take place only on the first Mondays of April, July, October, and January.<sup>5</sup>

In other respects, the general rules relating to notices and advertisements of sheriff’s sales apply to sales under a *levari facias*.

*In what order.*—Where a mortgagor has sold part of the mortgaged premises, the mortgagee, upon suing out the mortgage, is bound to proceed first against that part of the land remaining in the mortgagor’s hands, and will not be permitted to come upon the portion sold until he has exhausted the portion so remaining: and where the mortgagor has sold the whole in parts, at different periods, the mortgagee must come first upon the part last sold, and so on in an order inverse to the order in which they were sold.<sup>6</sup> Especially where there was an agreement to that effect with the first purchaser.<sup>7</sup> And the court will direct the sheriff so to sell, and in such order as

<sup>1</sup> Act 1705, § 4, 1 Sm. Laws 59, Purd. Dig. 329, n. c.

<sup>2</sup> *Passmore v. Gordon*, 1 Browne 320, C. P. Phila.

<sup>3</sup> *Topper v. Taylor*, 6 S. & R. 173.

<sup>4</sup> Act 11th March 1846, § 5, Purd. Dig. 752, pl. 31, Pamph. L. 115.

<sup>5</sup> Act 31st January 1862, § 1, Purd. Dig. 1282, pl. 1, Pamph. L. 9.

<sup>6</sup> *Mevey’s Appeal*, 4 Barr 80; *Cowden’s Estate*, 1 Barr 279, affirming *Nailer v. Stanley*, 10 S. & R. 450, which was shaken by *Corporation v. Wallace*, 3 Rawle 109; *Fluck v. Replogle*, 1 Harris 405. And see *Bank of Pa. v. Winger*, 1 Rawle 303.

<sup>7</sup> *Winberg v. Reiff*, D. C. Phila., 4 Barr 88, note a.

will produce most, and so protect the terre-tenant's rights and equities.<sup>1</sup>

And so where there are several distinct tracts or parcels covered by the mortgage, the sheriff has no right to sell more than are necessary to extinguish the liens, and if he does the sale will be set aside as to all the tracts sold after the purchase-money was sufficient.<sup>2</sup>

*To whom.*—Although the act is not clearly expressed, it has been the invariable usage for the sheriff to sell to the mortgagee as well as to a stranger, provided he be the highest bidder, no matter whether for a sum less than the debt and costs, and to make a deed to him sanctioned by an acknowledgment in open court.<sup>3</sup>

*Failure to sell. Alias. Liberari.*—Though by the 6th section of the Act of 1705,<sup>4</sup> in case of a want of buyers the land is directed to be delivered to the plaintiff, yet the practice has been to take an *alias levari facias* and not a *liberari*.<sup>5</sup> The writ of *liberari facias* does not appear to have been resorted to very frequently under this section; probably because on an *alias levari facias* the party could usually effect a sale to others, or become the purchaser himself, thus avoiding the expense, trouble, and loss of time attending an inquest upon the other process. Where, however, it is executed by actual delivery of the land, it is a satisfaction of the debt.<sup>6</sup>

If the property can be sold under the *levari*, the sheriff proceeds as upon other executions. If the sheriff does not receive the money under an effectual sale, there is nothing to prevent the plaintiff from going on to complete his execution.

If the sheriff return "struck off for a certain sum and that he cannot make title, therefore remains unsold," the plaintiff may issue a new execution. So if he returns the premises unsold.<sup>7</sup>

*Sheriff's deed.*—The rules as to the sheriff's deed and its acknowledgment, are the same as in other executions.

*Purchaser's title.*—In a *levari* on a mortgage, the purchaser takes only the estate for which the land was mortgaged, as appears by the mortgage or defeasible deed.<sup>8</sup> But a subsequent reversal of the judgment for error does not affect the title of the purchaser at a sheriff's sale under such judgment.<sup>9</sup> A terre-tenant, having no notice of the proceedings in the *scire facias*, may set up against the purchaser under the *levari*, any defence which he might have made to the *scire facias*.<sup>10</sup>

In a sale under a judgment upon a municipal claim, &c., or for taxes, in Philadelphia, the purchaser takes a defeasible title, subject to redemption by the owner, at any time within two years from the acknowledgment of the sheriff's deed, upon payment of all costs and charges and twenty per cent. upon the amount bid for the property.<sup>11</sup>

<sup>1</sup> Mevey's Appeal, 4 Barr 80.

<sup>7</sup> Peddle v. Hollinshead, 9 S. & R.

<sup>2</sup> Richards v. Brittin, D. C. Phila., 277.

<sup>5</sup> P. L. J. 73.

<sup>8</sup> Act 1705, § 8, Purd. Dig. 329, pl

<sup>3</sup> Blythe v. Richards, 10 S. & R. 261.

114, 1 Sm. Laws 60.

<sup>4</sup> Purd. Dig. 328, pl. 112, 1 Sm. 59.

<sup>9</sup> Act 1705, § 9, Purd. Dig. 329, pl.

<sup>6</sup> Topper v. Taylor, 6 S. & R. 173;

115, 1 Sm. Laws 60.

<sup>7</sup> Peddle v. Hollinshead, 9 S. & R. 277.

<sup>10</sup> Mevey's Appeal, 4 Barr 80.

<sup>8</sup> Baraet v. Washebaugh, 16 S. & R. 410.

<sup>11</sup> Act 13th May 1856, § 11, Purd. Dig. 752, pl. 36, Pamph. L. 569.

The person entitled to redeem<sup>1</sup> may enforce his right by petition to the court from which the process issued, setting forth the facts and his readiness to pay the redemption-money; upon which the court will grant a rule on the purchaser to show cause why he should not reconvey; such rule to be served like a summons in partition; and if the petitioner establishes his right to redeem, the court will make the rule absolute and enforce it by attachment.<sup>1</sup>

In *scire facias* on a mortgage, if there was no judgment on which a writ of *levari* could issue, the purchaser takes no title.<sup>2</sup> Where to a *sci. fa.* and *alias sci. fa.* there were returns of *nihil* as to the mortgagor, and appearance by the terre-tenants, whose attorney afterwards agreed in writing to withdraw his plea and confess judgment, on which the plaintiff's attorney endorsed an order to enter *this* judgment and issue a *levari*; whereupon the prothonotary, who was empowered by the rules of court to enter judgments by default on writs of *sci. fa.*, entered on his docket "judgment": it was held that the judgment thus entered was against the mortgagor by default on two *nihil*s and against the *terre-tenants* by confession, and that a *levari* might issue thereon.<sup>3</sup>

*Distribution of proceeds.*—In the case of mortgages the sheriff is required by the Act of 1705 to pay the plaintiff the proceeds:<sup>4</sup> and if there be any surplus, to pay that to the defendant, and until he has so done he is not to be discharged.<sup>5</sup> If, however, there are liens posterior to the mortgage he cannot safely do this, but should pay the surplus into court to be distributed as in other executions.

In the case of mechanics' liens, all the valid liens are of equal rank, and come in upon the fund *pro rata* without regard to priority.<sup>6</sup> Of course, encumbrances which are prior to this class of claims are to be first paid according to the general rules of distribution.

In the case of a sale in Philadelphia for municipal claims or taxes, the lien of a mortgage prior to the registry of the claim on which the sale was made is not divested thereby.<sup>7</sup> So the estate in a ground-rent is not divested by the sale of the land, out of which such rent issues, for taxes, municipal claims, &c., in Philadelphia.<sup>8</sup> Estates and liens not divested by a sheriff's sale have, of course, no claim against the fund: as to those which are divested the general rules of distribution apply.<sup>9</sup>

5. *Of compelling contribution against joint defendants.*—Where the real estate of several persons is subject to the lien of a judgment to which in law or equity they are bound to contribute, any one having a right to have contribution or subrogation, in case of pay-

<sup>1</sup> Act 13th May 1856, § 11, Purd. Dig. 752, pl. 36, Pamph. L. 569.

<sup>2</sup> *Wilson v. McCullough*, 7 Harris 77.

<sup>3</sup> *Cooper v. Borrall*, 10 Barr 491.

<sup>4</sup> Sect. 6, Purd. Dig. 328, pl. 112, 1 Sm. Laws 59.

<sup>5</sup> Sect. 7, Purd. Dig. 329, pl. 113.

<sup>6</sup> Act 16th June 1836, § 22, Purd. Dig. 713, pl. 31.

<sup>7</sup> Act 23d January 1849, § 4, Purd. Dig. 753, pl. 37, Pamph. L. 686.

<sup>8</sup> *Ibid.*, § 5. The contrary was supposed to have been decided in *Salter v. Reed*, 3 Harris 264. But that case went on the ground that the owner of the ground-rent had neglected to record his deed, and consequently the sheriff's vendee had no notice.

<sup>9</sup> See *ante*, p. 1037-71.

ment, may, upon suggestion by affidavit and proof of the facts necessary to establish such right, obtain a rule upon the plaintiff, to show cause why he should not levy upon and make sale of the real estate liable to execution under said judgment; in the proportion or in the succession in which the several properties are liable to contribution for the discharge of the common encumbrance, otherwise upon payment of the judgment to assign the same for such uses as the court may direct; and the court has power to direct to what uses the said judgment shall be assigned, and when assigned direct all executions thereon so as to subserve the rights and equities of all parties whose real estate is liable: and if the plaintiff shall refuse to accept his debt and make such assignment of his judgment, the executions thereupon in the hands of the plaintiff, shall be so controlled and directed by the court as to subserve said rights and equities.<sup>1</sup>

6. *Bill of discovery in aid of execution.*—Under the Act of 1836 the defendant, and all persons holding his effects, may be compelled to disclose the requisite information relating thereto, by a bill of discovery or interrogatories to be framed according to the rules and practice in courts of equity. The Courts of Common Pleas are provided with adequate power for these purposes; thus, to guard against the absconding or departure of any of the parties in the bill, they are empowered to direct a clause of *capias* in the *scire facias* against them, under the rules relating to the garnishees in foreign attachment, and they are authorized to regulate the payment of costs, at their discretion, according to the rules in equity.

*Jurisdiction.*—The Court of Common Pleas of the county where the judgment may be has exclusive jurisdiction under the act, whether the judgment was obtained in the Common Pleas or in another court of the county.<sup>2</sup> Neither the Supreme Court,<sup>3</sup> nor the District Court,<sup>4</sup> have jurisdiction in such cases. And as regards the District Court of Philadelphia, this jurisdiction has not been conferred by the Act of 1854, giving that court concurrent jurisdiction with the Common Pleas in all equity cases.<sup>5</sup>

If the person of whom discovery may be sought resides out of the county, the bill may be filed in the Common Pleas of the county where he does reside.<sup>6</sup>

*When it lies.*—A bill of discovery lies to discover *debts* due to the defendant in the judgment,<sup>7</sup> as well as his real and personal estate.<sup>8</sup> Though it is not the practice to compel a discovery of the defendant's personal estate until a *fi. fa.* has issued, and been returned *nulla bona*, yet discovery will be compelled of real estate without such previous execution, and a plaintiff is entitled to the bill of discovery, notwithstanding he has levied on goods alleged to belong to the defendant, if the sheriff were prevented from pro-

<sup>1</sup> Act 22d April 1856, § 9, Purd. Dig. 578, pl. 40, Pamph. L. 534.

<sup>2</sup> Act 16th June 1836, § 9, Purd. Dig. 406, pl. 42, Pamph. L. 763.

<sup>3</sup> Davis v. Gerhard, 5 Whart. 466.

<sup>4</sup> Gouldy v. Gillespie, 4 P. L. J. 91.

<sup>5</sup> Act 8th May 1854, § 1, Purd. Dig. 402, pl. 10, Pamph. L. 679; Clark

v. Rush, D. C. Phila., 1 Phila. Rep. 572.

<sup>6</sup> Act 16th June 1836, § 10, Purd. Dig. 406, pl. 43, Pamph. L. 763.

<sup>7</sup> Bevans v. The Turnpike, 10 Barr 174.

<sup>8</sup> Act 16th June 1836, § 9, Purd. Dig. 406, pl. 42.



ceeding by an allegation that the property had been transferred to another.<sup>1</sup> For the discovery of real estate a bill will be sustained in all cases where the knowledge of such real estate is contained in the mind alone of the defendant, as where it is held in trust for him, either through conveyance in which he is named as *cestui que trust*, or where the trust is entirely secret and concealed; but where the defendant's property, and every interest belonging to him, is spread out in the public records, so that all necessary information can be obtained there by search made by the complainant, the court will not compel the defendant to exhibit the same in his answers.<sup>2</sup>

It is said that a bill of discovery lies in all cases to which an attachment-execution is applicable.<sup>3</sup>

Discovery may be compelled against a corporation;<sup>4</sup> but the sequestrator is the only person who can file the bill; a judgment-creditor is confined to his sequestration.<sup>5</sup>

In general a court of equity will intervene in aid of a judgment-creditor only when the remedy afforded him at law is ineffectual to reach the property of the debtor, or the enforcement of the legal remedy is obstructed by some encumbrance upon the debtor's property, or some fraudulent transfer of it: it is indispensable that the party seeking relief should show that he has attempted in vain to enforce his remedy at law.<sup>6</sup> But under our statutory proceeding this does not seem to be requisite.

*Against whom.*—The bill may be filed against the defendant in the judgment, and against any person having possession of his real or personal estate, or who may owe or be accountable for the same, or may have knowledge of the same.<sup>7</sup>

*Form.*—The bill must set forth: 1. The recovery of a judgment, and the amount actually due thereon. 2. That there is reason to believe that the defendant in such judgment has real or personal estate, wherewith the same may be satisfied. 3. That such real estate has been conveyed, transferred, or encumbered, or that such personal estate has been removed, transferred, or concealed, or, that by reason of concealment, or fraudulent transfer, or encumbrance thereof, the complainant is prevented from having execution of his judgment. 4. If such bill be filed against any other than the defendant in the judgment, it must set forth also, that such person has possession or knowledge of such real or personal estate, or that he can make discovery of such facts as will enable the plaintiff to have satisfaction of his judgment.<sup>8</sup>

The bill must be accompanied by an affidavit made by the complainant himself, or his agent or attorney, or any disinterested per-

<sup>1</sup> *Large v. Bristol Transportation Co.*, 2 Ash. 394.

<sup>2</sup> *Rose v. Lloyd*, 2 P. L. J. 321, per KING, P. J.

<sup>3</sup> *French v. Breidelman*, 2 Grant 319, per LOWRIE, J.

<sup>4</sup> *Large v. Bristol Transportation Co.*, 2 Ash. 394.

<sup>5</sup> *Bevans v. The Turnpike*, 10 Barr 174.

<sup>6</sup> *Jones v. Green*, S. Ct. U. S., 21 Leg. Int. 133.

<sup>7</sup> Act 16th June 1836, § 10, Purd. Dig. 406, pl. 43, Pamph. L. 763.

<sup>8</sup> Act 16th June 1836, § 11, Purd. Dig. 406, pl. 44, Pamph. L. 764.

son in his behalf, that he verily believes the facts set forth therein to be true.<sup>1</sup>

And the complainant may, either in the bill or by interrogatories to be filed therewith, propound to the defendants such questions touching the subject-matter thereof, as may be necessary and proper for the purposes thereof, and as may be according to the rules and practice of courts of equity.<sup>2</sup>

It is well also to add a prayer for a writ of *scire facias* to compel the defendants to appear and answer the interrogatories.<sup>3</sup>

*Scire facias*.—Upon the filing of the bill the court, or any judge thereof in vacation, may award a writ of *scire facias* to the sheriff, requiring him to make known to the defendants therein named that they be and appear, at a certain time to be appointed by the court, to answer the bill and all such interrogatories as shall be propounded to them, or show cause why they should not, and abide the judgment of the court in the premises.<sup>4</sup>

*Service*.—No defendant can be compelled to answer at the return of the *scire facias*, unless a copy of the bill and interrogatories has been served upon him at least ten days prior to the return.<sup>5</sup> But he is not excused from answering by the fact that ten days did not intervene between the service and return of the *scire facias*, though he is not bound to answer till ten days after a service of a copy of the bill and interrogatories.<sup>6</sup> But the objection that sufficient time did not intervene, cannot be taken by means of a demurrer to the bill; the proper course is to move to quash the process for irregularity.<sup>7</sup> Leaving a copy of the bill and interrogatories at the dwelling-house of the defendant in the presence of one or more of the adult members of his family, is a good service.<sup>8</sup>

*Effect of service*.—From the time of the service of the *scire facias* upon a stranger to the judgment, the personal property of the defendant in the hands of such person is bound, and becomes liable to be taken in execution at the instance of the plaintiff, in like manner as goods or effects in the hands of the garnishee in foreign attachment; and if such person, after service of the *scire facias*, transfers such personal property to any other person, he becomes liable to pay the value thereof to the complainant out of his own proper goods and chattels.<sup>9</sup> The remedy here provided is the exclusive one, and if the goods have been fraudulently transferred they are liable to seizure by any creditor of the debtor, the complainant being included; they are not protected by the service of the *scire facias* from seizure in execution under a subsequent *fi. fa.*<sup>10</sup>

<sup>1</sup> Act 16th June 1836, § 12, Purd. Dig. 407, pl. 45, Pamph. L. 764; Act 24th April 1844, § 2; Purd. Dig. 407, pl. 46, Pamph. L. 512.

<sup>2</sup> Act 16th June 1836, § 13; Purd. Dig. 407, pl. 47.

<sup>3</sup> Precedents of a Bill of Discovery are given in Bright. Eq. 678, and Smith's Forms 333, pl. 1, 335, pl. 2. For a precedent of the *Scire Facias*, see Smith's Forms 338, pl. 3.

<sup>4</sup> Act 16th June 1836, § 14, Purd. Dig. 407, pl. 48.

<sup>5</sup> Act 16th June 1836, § 15, Purd. Dig. 407, pl. 49.

<sup>6</sup> *Large v. Bristol Transportation Co.*, 2 Ash. 394.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Gouldley v. Gillespie*, 4 P. L. J. 510.

<sup>9</sup> Act 16th June 1836, § 17, Purd. Dig. 407, pl. 51, Pamph. L. 765.

<sup>10</sup> *Bennett's Appeal*, 10 Harris 476.

*The proceedings in the scire facias* are substantially the same as those in a *scire facias* in foreign attachment.<sup>1</sup> And therefore where the defendant and garnishee have waived their privilege of trial by jury by omitting to plead to the *scire facias*, and have submitted their case upon their answers to the interrogatories, the court may render a joint judgment against them both for the amount of plaintiff's debt.<sup>2</sup>

In proceedings by warrant of arrest, and perhaps the same rule applies to a bill of discovery in aid of execution, no person is excused from answering in relation to such fraudulent concealment of the property of the defendant in a judgment as is within the prohibition of that act,<sup>3</sup> but the answer cannot be used in evidence in any other suit or prosecution.<sup>4</sup>

*The costs* of the proceedings are within the discretion of the court in which the bill is filed, and the court has power to direct payment of such costs by either of the parties to the bill, according to the rules of equity and justice.<sup>5</sup>

*Execution.*—After judgment for the plaintiff, upon the bill of discovery, the court may award execution against the effects, provided the original judgment was in the court where the proceedings for discovery are had.

But the Common Pleas of Philadelphia cannot award execution against the effects after discovery has been there compelled upon the prayer of a plaintiff having a judgment in another court; their power to issue executions is confined to judgments rendered by their own court; and in such case resort must be had, under the 35th section of the Act of 1836, to the court in which the judgment is.<sup>6</sup> And this court at one time held that their power to issue execution against personal property after discovery on a *scire facias*, did not extend to the case of a judgment on a transcript from an alderman filed in the Common Pleas.<sup>7</sup> But the law now seems to be that a transcript is a judgment which can be used for the purpose of equitable as well as of other executions.<sup>8</sup>

The court or judge at the time of awarding the *scire facias*, may order that a clause of *capias* be inserted in such writ against the defendants, or any one or more of them, under the rules and regulations provided in case of a garnishee in a foreign attachment.<sup>9</sup> The object of this clause of *capias* is to guard against the absconding or departure of any of the parties in the bill, and the consequence of its insertion is to cause the defendant to be arrested, and compel him to give bail for his appearance. The clause of *capias* is no longer used in actions of foreign attachment since the passage

<sup>1</sup> Shaffer v. Watkins, 7 W. & S. 219.

<sup>2</sup> Ibid.

<sup>3</sup> Act 12th July 1842, § 20, Pamph. L. 344. This section is re-enacted in the Criminal Code, Act 31st March 1860, § 130, Purd. Dig. 239, pl. 139, Pamph. L. 413.

<sup>4</sup> Act 12th July 1842, § 22, Purd. Dig. 38, pl. 69.

<sup>5</sup> Act 16th June 1836, § 18, Purd. Dig. 407, pl. 52, Pamph. L. 765.

<sup>6</sup> Platt v. Bridges, C. P. Phila., 1837, MS.

<sup>7</sup> Perot v. Spicer, C. P. Phila., 1837, MS.

<sup>8</sup> Hitchcock v. Long, 2 W. & S. 169.

<sup>9</sup> Act 16th June 1836, § 16, Purd. Dig. 407, pl. 50, Pamph. L. 765.

of the "act to abolish imprisonment for debt;"<sup>1</sup> and if still in force in the proceeding now under consideration, it must be confined to cases in which the defendant is liable to arrest under that act.<sup>2</sup>

7. *Execution against life estate.*—After levying on a life estate, or a reversion or remainder dependent upon a life estate, the sheriff could formerly have proceeded and sold without an inquest, for the estate being of uncertain duration, it was deemed doubtful whether the former would last seven years, or the latter come into possession within that period, and the only use of an inquisition was to ascertain whether the profits of the land would discharge the judgment in that time.<sup>3</sup> And an inquest on an estate for life was considered irregular, and was quashed.<sup>4</sup>

This is still the mode of proceeding against life estates in unimproved lands, not yielding rents, issues, and profits, as woodlands, or a vacant lot in town.<sup>5</sup> And even life estates in lands yielding rents, issues, and profits, may now be sold in the manner provided by law in the case of estates of inheritance, unless some lien-creditor, on or before the return day of the first writ of *venditioni exponas*, on which a sale is advertised, shall have procured a sequestrator to be appointed.<sup>6</sup> The proceeding, when a sequestrator is appointed, will be explained presently, after some peculiarities in the sale of life estates under *venditioni exponas* have been noticed.

Though a life estate may now, since the Act of 24th January 1849, be sold in execution, it cannot be sold under a *fi. fa.*; the sale must be in the manner provided by law in the case of estates of inheritance, and it can only be made under a *venditioni exponas*.<sup>7</sup> And where the life estate is merged in the fee, both can be sold on a judgment obtained after the merger, though in the distribution the court will discriminate between claims against the life estate and those against the fee, by permitting the estimated value of the life estate to be appropriated to the claims upon it.<sup>8</sup>

If the defendant, his agent or attorney, or the occupant of the land, makes request and gives notice to the plaintiff, his agent or attorney, at least three days before the holding of the inquisition, the sheriff must, if the life estate is condemned, cause the inquest to appraise the yearly value of the lands, and return the same as part of the inquisition and condemnation; and the defendant, his agent or attorney, or the occupant of the land, has thirty days to elect by notice in writing, to the sheriff or coroner, to pay the plaintiff the annual value in half-yearly instalments; if the defendant, &c., fail to elect, or if he elects and fails to pay for thirty days

<sup>1</sup> Act 12th July 1842, § 1, Purd. Dig. 36, pl. 50, Pamph. L. 339.

<sup>2</sup> *Vide ante*, Chap. VI., "Privilege from Arrest."

<sup>3</sup> *Roe v. Humphreys*, 1 Yeates 427; *Burd v. Lessee of Dansdale*, 2 Binn. 91.

<sup>4</sup> *Howell v. Woolfort*, 2 Dallas 75.

<sup>5</sup> See *Lessee of Duncan v. Robeson*, 2 Yeates 455.

<sup>6</sup> Act 24th January 1849, § 3, Purd. Dig. 444, pl. 85, Pamph. L. 676. It

had been previously held that under the Act of 13th October 1840, a life estate in improved lands could not be taken in execution: *Dennison's Appeal*, 1 Barr 201; *Parget v. Stambaugh*, 2 Ibid. 485; *Eyrick v. Hetrick*, 1 Harris 488.

<sup>7</sup> *Com. v. Allen*, 6 Casey 49, per Strong, J.

<sup>8</sup> *Dennison's Appeal*, 1 Barr 201.

after any half-yearly payment becomes due, the plaintiff may proceed as in cases of estates of inheritance extended on a sheriff's inquest;<sup>1</sup> that is, he must first file an affidavit in the prothonotary's office of the non-payment of the semi-annual rental, and then may issue a *venditioni exponas* to sell the estate as if it had been condemned by inquisition;<sup>2</sup> the form of a notice to the sheriff to appraise the yearly value of the life estate, and also of the notice to the plaintiff that such request has been made, are given by Smith.<sup>3</sup>

In case the annual rent found by the inquest is sufficient to pay the interest on the debts entered of record, the plaintiff cannot have a *venditioni exponas* to sell the life estate.<sup>4</sup>

The *venditioni* for the sale of a life estate can only issue by order of the proper court, and after ten days' notice of the application for the writ being given to the tenant for life.<sup>5</sup> And a sale of a life estate under a *venditioni*, issued without such order and notice, is void, and confers no title on the purchaser.<sup>6</sup>

*Sequestration.*—The provisions just recited for the sale of a life estate in improved lands, are only effectual where there has been no application made in due time for the appointment of a sequestrator.<sup>7</sup> But where the parties interested permit proceedings repugnant to the privilege of sequestration to be taken, they will be deemed to have waived it.<sup>8</sup> And a sequestration is unnecessary where there is an adverse possession in hostility to the defendant's life estate; or where the defendant claims to hold in fee; or the creditor has reasonable grounds to believe that the debtor owns the fee: in all these cases the defendant's interest in the land may be sold in execution.<sup>9</sup> So a sequestrator will not be appointed where the life estate has been converted into money.<sup>10</sup>

A *levari facias* upon a judgment on a mechanic's lien, is an execution upon which a sequestrator may be appointed.<sup>11</sup>

Where a life estate in improved lands has been taken in execution, the court, upon the application of a lien-creditor, must award a writ to sequester the rents, issues, and profits of such estate, and appoint a sequestrator to carry the same into effect.<sup>12</sup> It has been said that the application may be made at any time before the sale;<sup>13</sup> but since the Act of 24th January 1849,<sup>14</sup> it would seem that it must be made before the return day of the first writ of *venditioni exponas* on which a sale is advertised.<sup>15</sup>

The act makes the appointment of the sequestrator imperative

<sup>1</sup> Act 24th January 1849, § 4, Purd. Dig. 444, pl. 86, Pamph. L. 676.

<sup>2</sup> Act 13th October 1840, § 3, Purd. Dig. 441, pl. 68, Pamph. L. 2. And see *ante*, p. 986 *et seq.*

<sup>3</sup> Smith's Forms 382, pl. 29, 30.

<sup>4</sup> Act 24th January 1849, § 4, 2d proviso, *supra*.

<sup>5</sup> *Ibid.*, 3d proviso; Com. v. Allen, 6 Casey 49; Kintz v. Long, *Ibid.* 501; Snyder v. Christ, 3 Wright 499.

<sup>6</sup> Kintz v. Long, 6 Casey 501.

<sup>7</sup> Act 24th January 1849, § 3, and

§ 4, proviso 1; Purd. Dig. 444, pl. 85, 86, Pamph. L. 676.

<sup>8</sup> Gordon v. Inghram, 1 Grant 152.

<sup>9</sup> S. C., 8 Casey 214.

<sup>10</sup> Lancaster Bank v. Stauffer, 10 Barr 398.

<sup>11</sup> Pentland v. Kelly, 6 W. & S. 484.

<sup>12</sup> Act 13th October 1840, § 6, Purd. Dig. 443, pl. 81, Pamph. L. 3.

<sup>13</sup> Pentland v. Kelly, 6 W. & S. 484.

<sup>14</sup> Sect. 3, *ubi supra*.

<sup>15</sup> See Com. v. Allen, 6 Casey 49, per STRONG, J.

upon the court upon the application being made; and makes no distinction as to the kind of creditor who may apply.<sup>1</sup> The form of application is given by Smith.<sup>2</sup>

The sequestrator has power, under the direction of the court, to rent or sell the lands, for a term during the life of the tenant which will be sufficient to satisfy all liens against them, together with all charges for taxes, repairs, and expenses during such term, and must apply the proceeds, under the direction of the court, to the payment of the liens in the order of their priority.<sup>3</sup> In estimating the value of the life estate, the rule adopted in England, and in this State, is to put it at one-third the price or value of the fee-simple estate, including the life estate.<sup>4</sup>

The court may, when they think necessary, require a bond with sufficient surety from the sequestrator for the faithful execution of his trust; and may compel him to account from time to time, as they shall think necessary.<sup>5</sup> The form of the bond may be found in Smith.<sup>6</sup> Sequestrators' accounts are required to be recorded by the prothonotary, like those of assignees, trustees, and committees.<sup>7</sup>

The court has all the powers of a court of chancery, as regards making and enforcing orders, allowances, and decrees in the premises.<sup>8</sup> The court will compel the sequestrator to do his duty.<sup>9</sup>

The sheriff is bound, as often as required, upon application in writing made by the sequestrator, with the sanction of any judge of a court of the county, to put and keep such sequestrator, his vendees or lessees, in full and undisturbed possession of the sequestered estate; and any person unlawfully disturbing the possession of the sequestrator, his vendees or lessees, or obstructing the sheriff in the execution of the duties above mentioned, is liable to indictment, and upon conviction, to a penalty of not exceeding one hundred dollars, the costs of prosecution, and imprisonment in the county jail for a term not exceeding six months, and is also liable in trespass for such damages as the sequestrator, his vendee or lessee, or the plaintiff in the execution, has sustained; and he may be required, upon cause shown, to give surety of the peace before any judge or justice of the peace or alderman, for the prevention or against the repetition of the offence: the sheriff in performing the above duties has the same powers and privileges, and is entitled to the same fees, as in executing writs of *habere facias possessionem* and of *estrepement*.<sup>10</sup>

8. *Execution against corporations.* 1. *Private corporations.*—The mode of proceeding on executions issued from a court of record against private corporations, is prescribed in the Act of 16th June 1836. This mode varies according as the corporation is or is not possessed of property which may be levied on. The proceeding

<sup>1</sup> *Pentland v. Kelly*, 6 W. & S. 484.

<sup>2</sup> Smith's Forms 380, pl. 27.

<sup>3</sup> Act 13th October 1840, § 7, *Purd.* Dig. 443, pl. 82, *Pamph. L.* 3.

<sup>4</sup> *Dennison's Appeal*, 1 Barr 201.

<sup>5</sup> Act 13th October 1840, § 8.

<sup>6</sup> Smith's Forms 381, pl. 28.

<sup>7</sup> Act 25th April 1850, § 19, *Purd.* Dig. 856, pl. 11, *Pamph. L.* 572.

<sup>8</sup> Act 13th October 1840, § 8, *Purd.* Dig. 443, pl. 83, *Pamph. L.* 3.

<sup>9</sup> *Pentland v. Kelly*, 6 W. & S. 484.

<sup>10</sup> Act 24th January 1849, § 5, *Purd.* Dig. 443, pl. 84, *Pamph. L.* 677.

provided by the act is exclusive, and a bill in equity by a creditor for special relief will not be sustained.<sup>1</sup>

*In case there is property*, the writ commands the sheriff or other officer to levy the sum recovered, together with the costs of suit, of the goods and chattels, lands and tenements, of the corporation.

*How executed.*—The officer must go to the banking-house or other principal office of the corporation during the usual office hours, and demand of the president or other chief officer, cashier, treasurer, secretary, chief clerk, or other officer having charge of such office, the amount of such execution, with legal costs. If no person can be found on whom such demand can be made, or if the amount of the execution be not forthwith paid in lawful money, after such demand, the officer shall seize personal property of the corporation sufficient to satisfy the execution. If the corporation is a banking company, and other sufficient personal property cannot be found, the officer shall take so much of any current coin of gold, silver, or copper, which he may find, as shall be sufficient to satisfy the execution. If sufficient personal property cannot be found, the officer shall levy upon the real estate of the corporation, and thereupon the proceedings shall be in the usual manner provided in other cases for the sale of land upon execution.<sup>2</sup> Lands held by a railroad company, beyond what are actually dedicated to corporate purposes, are bound by the lien of judgments against the corporation, and are liable to be levied in execution as lands of any other debtor; thus, a canal basin is not a legitimate incident to a railroad company having no authorized canal connection, and is not protected from levy and sale:<sup>3</sup> but the sheriff's vendee takes only that which is not necessary for the full enjoyment and exercise of the corporate franchise, no matter how acquired by the corporation.<sup>4</sup>

The rolling-stock and equipments of a railroad company may not be seized in execution after the company has become insolvent, or has mortgaged its stock and equipments: but in such cases the equity that would restrain a sale springs out of the insolvency, or the trusts created by the mortgage: where there is no insolvency or mortgage-trusts, it would seem that the stock might be seized.<sup>5</sup>

A mortgage of the personal property of a railroad company is good, without delivery of possession to the mortgagee, against an ordinary judgment-creditor, as respects all property necessary to carry on the business of the road.<sup>6</sup>

Where there is a question whether the company had power to mortgage, the court, without deciding it on a motion for a special injunction, will enjoin creditors and the sheriff from proceeding to

<sup>1</sup> *Suydam v. N. W. Ins. Co.*, S. Ct., 23 Leg. Int. 53.

<sup>2</sup> Act 16th June 1836, § 72, *Purd. Dig.* 199, pl. 37-41, *Pamph. L.* 774.

<sup>3</sup> *Plymouth Railroad Co. v. Colwell*, 3 Wright 337. And see *ante*, p. 797.

<sup>4</sup> *Plymouth Railroad Co. v. Colwell*, 3 Wright 337.

<sup>5</sup> *Loudenslager v. Benton*, N. P., 4 Phila. Rep. 382; s. c., 3 Grant 384.

But see *contra*, *Covey v. P., F. W. & C. Railroad Co.*, C. P. Beaver, 15 Leg. Int. 228; s. c., 1 Phila. Rep. 173.

<sup>6</sup> *Covey v. P., F. W., & C. Railroad Co.*, C. P. Beaver, 15 Leg. Int. 228.

sell property covered by the mortgage, but directing that the lien of the *fi. fas.* shall continue till further order.<sup>1</sup>

When a railroad, canal, turnpike, bridge, or plank-road of a corporation, created by or under a law of this State, shall be sold and conveyed under and by virtue of any process or decree of any court of this State or of the United States, the purchasers may organize a new corporation with all the franchises, &c., of the old one.<sup>2</sup> This is since extended to slack-water or lock navigation companies.<sup>3</sup> But debts due to the commonwealth by the old corporation must first be paid or secured.<sup>4</sup>

An attachment-execution may issue upon a judgment against a private corporation.<sup>5</sup>

*Proceedings for discovery of effects* of a corporation against which judgment has been obtained and execution thereon has been returned unsatisfied, are provided by the Act of 14th April 1828, § 1.<sup>6</sup> The plaintiff must apply to the court by petition and affidavit,<sup>7</sup> stating that no property of the corporation can be found, and that the petitioner verily believes that their effects are concealed for the purpose of avoiding the payment of their debts. Upon this the court may issue a citation to any officer of the corporation, commanding him to appear at a fixed day and answer such interrogatories as may be put to him touching the effects of the corporation. The citation is to be served by the sheriff. Interrogatories must be filed with the prothonotary fifteen days before the return day: The answers must be filed on or before the return day. A party neglecting to answer satisfactorily may be attached. If the answers disclose effects, a writ in the nature of a sequestration may issue, which is to be served by the sheriff upon the party in whose possession or control the effects are alleged to be, and to have the same effect as if such party had been summoned as garnishee in foreign attachment. Subsequent proceedings are like proceedings against garnishee in foreign attachment after judgment against defendant.

This proceeding is now, perhaps, superseded by the Bill of Discovery in aid of Execution, which has been already explained.<sup>8</sup>

*Where no property can be found. Sequestration.*—In every case of a judgment against a private corporation, and an execution thereon which has been returned unsatisfied in part or in the whole, the court in which the judgment was obtained may, upon the bill or petition of the plaintiff,<sup>9</sup> award a writ to sequester the goods, chattels and credits, rents, issues and profits, tolls and receipts, from any road, canal, bridge, or other work, property or estate of such corporation.<sup>10</sup> Such writ is process of execution and may issue

<sup>1</sup> Loudenslager v. Benton, N. P., 4 ante, p. 939. Phila. Rep. 382.

<sup>2</sup> Act 8th April 1861, § 1, Purd. Dig. 200, pl. 43, Pamph. L. 259.

<sup>3</sup> Act 17th April 1866, § 1, Purd. Dig. 1420, pl. 1, Pamph. L. 112.

<sup>4</sup> Act 11th April 1862, § 1, Purd. Dig. 1270, pl. 2, Pamph. L. 450.

<sup>5</sup> Act 20th March 1845, § 4, Purd. Dig. 201, pl. 40, Pamph. L. 189. See

<sup>6</sup> Purd. Dig. 201, pl. 48.

<sup>7</sup> For the Form of the Petition, see Smith's Forms 123, pl. 6.

<sup>8</sup> See ante, p. 1146.

<sup>9</sup> For the Form of the Petition, see Smith's Forms 121, pl. 4.

<sup>10</sup> Act 16th June 1836, § 73, Purd. Dig. 200, pl. 45, Pamph. L. 775.



without previous notice: the return of the previous execution unsatisfied is sufficient to warrant the issuing of a sequestration, and the truth of such return is not the subject of review on error.<sup>1</sup>

*Where sequestration lies.*—It may issue on a judgment transferred to another county under the Act of 16th April 1840.<sup>2</sup> It is no ground for refusing it that the defendant corporation may have no assets which are subject to such writ.<sup>3</sup> On a bill in equity praying for discovery and relief against an insolvent corporation, a decree for the payment of money may be enforced by *fieri facias* followed by sequestration.<sup>4</sup>

The improvident issue of a writ of sequestration is the subject of a writ of error.<sup>5</sup>

*Against what.*—Land which has been appropriated to corporate objects, and is necessary for the full enjoyment and exercise of any franchise of the company, is entirely exempt from levy and sale; such exemption rests on the public interests involved in the corporation: sequestration is the only legal remedy against such land.<sup>6</sup> It may not issue against an unfinished railroad.<sup>7</sup>

*The form of the writ of sequestration may be found in Smith's Forms.*<sup>8</sup>

A writ which authorized the sequestrator "to seize and take into his possession all the goods, chattels, moneys, credits, and effects, roads, bridges, and other works, property and estate of the H. Railroad Company, and to receive all the rents, issues, profits, tolls," &c., was ordered to be amended so as to authorize the sequestrator to "sequester the goods, chattels, credits, rents, issues and profits, tolls and receipts from the roads, bridges, and other works, property and estate of the said H. Railroad Company."<sup>9</sup>

*The sequestrator.*—Upon awarding the writ the court must appoint a sequestrator to execute the same, and to take charge of the property and funds taken or received by virtue of such writ, and to distribute the net proceeds thereof among all the creditors of the defendant corporation according to the rules established in the case of the insolvency of individuals.<sup>10</sup> Upon awarding the writ the court will not interpret words of the act contained in the writ, and will not, before it becomes necessary, declare what are the powers of the sequestrator.<sup>11</sup>

*Powers and duties.*—The sequestrator has all the powers and is subject to all the duties, of trustees appointed under the law relating to insolvent debtors.<sup>12</sup> But a sequestrator has no estate in the thing itself, and that provision of the insolvent laws which invests the

<sup>1</sup> Reid v. N. W. Railroad Co., 8 Casey 257. But this act is not retroactive: Reid v. N. W. Railroad Co., 8 Casey 257.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Wesley Church v. Moore, 10 Barr 275, per Gibson, C. J.

<sup>5</sup> Turnpike Co. v. Craighead, 5 Barr 470.

<sup>6</sup> Plymouth Railroad Co. v. Colwell, 3 Wright 337.

<sup>7</sup> Act 22d April 1858, Pamph. L. 458.

<sup>8</sup> Smith's Forms 122, pl. 5.

<sup>9</sup> Betts v. Harrisburg Railroad Co., 4 P. L. J. 322.

<sup>10</sup> Act 16th June 1836, § 74, Purd. Dig. 200, pl. 46, Pamph. L. 775.

<sup>11</sup> Betts v. Harrisburg Railroad Co., 4 P. L. J. 322.

<sup>12</sup> Act 16th June 1836, § 74.

trustee with all the estate and property of the insolvent, and confers upon him the capacity to sue for and recover in his own name, all such estates and property, and all debts, and things in action belonging to the insolvent seems to have been purposely omitted.<sup>1</sup> Though under our statutory execution a sequestrator may, under the order of the court, absolutely dispose of personal chattels sequestrated, his business with roads, canals, bridges, or other like property of a corporation, is merely to take the rents, issues, and profits, and distribute them, under the direction of the court, among the creditors; to enable him to perform this duty, he is authorized to take charge of the property and funds, but the legal title still remains in the corporation, to which ultimately the possession may again be united: and the same may be said of its issues and debts accruing, until finally disposed of.<sup>2</sup> Hence an action for tolls for passing over a turnpike-road, during their sequestration, must be brought in the name of the company and not in that of the sequestrator: but in such suit for tolls accruing after sequestration, the defendant cannot set off a claim for a loan by him to the company before sequestration, and before the account for tolls commenced.<sup>3</sup>

The sequestrator may file a bill for the discovery of assets, &c., belonging to the corporation.<sup>4</sup>

*Payment of debts.*—The money received by the sequestrator is to be distributed among the creditors according to the rules in case of insolvency of individuals: judgments or mortgages binding the property are to be paid first; but unless such judgments, &c., were given in pursuance of special authority from the legislature, they do not bind the tolls nor real estate necessary for the enjoyment of corporate franchises.<sup>5</sup> And the judgment under which the sequestration was obtained has no preference of payment out of tolls, &c., received subsequently: the debts are payable *pro rata*.<sup>6</sup> And where a turnpike-road was sold under execution, under an Act of Assembly passed after its sequestration, the court directed the proceeds of sale, after deducting costs, to be applied to the balance due to the sequestrator appearing on the settlement of his account, in preference to a claim by judgment against the company.<sup>7</sup>

*Control exercised by the court.*—The court has power at the time of awarding the writ, or afterwards, to make such orders and decrees as may be necessary to carry the same into full and complete effect; and they may also make all such other orders and decrees in the premises, for the purpose of giving full and effectual relief to all the creditors of such corporation, as shall be agreeable to equity, and they may enforce all such orders against all persons neglecting or refusing to comply therewith, or obstructing the execution thereof, or of such writ by attachment, or by a writ or writs to the sheriff or

<sup>1</sup> *Beeler v. The Turnpike Co.*, 2 Harris 166, per BELL, J.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Bevans v. Turnpike Co.*, 10 Barr

174.

<sup>5</sup> *Steiner's Appeal*, 3 Casey 313; *Beam's Appeal*, 7 Harris 453.

<sup>6</sup> *Leedom v. Plymouth Railroad Co.*, 5 W. & S. 265.

<sup>7</sup> *Beam's Appeal*, 7 Harris 453.

coroner, in aid of the sequestrator, or otherwise, as fully as a court of chancery might do.<sup>1</sup>

Where a party, by making an unfounded claim for more than he is entitled to, caused an auditor to be appointed and a contest for distribution, the court may impose the costs upon the portion coming to him.<sup>2</sup>

*In case of a public work*, in the maintenance or repair of which the public may be interested, and which may from time to time require a portion of the revenue thereof to be expended thereon, the court which awards the writ of sequestration shall make such allowances for such purpose, and otherwise take such order thereon, as the public good shall require.<sup>3</sup>

The mode of proceeding against corporations will be discussed at large hereafter.<sup>4</sup>

*Object of proceeding.*—The intention of the Act of 1836 was not that any of the creditors of an insolvent corporation should gain a preference by taking out an execution for his separate benefit; but that on the return of an unsatisfied execution the plaintiff should proceed no further than to sue out a writ of sequestration, and have the corporate revenue applied, in the first place, to the maintenance and repair of the works of a public nature, and in the second, to *pro rata* payment of all the debts, as in any other case of insolvency. In fact, the sequestration is no more nor less than a process of insolvency, and the sequestrator is expressly clothed with the attributes of an assignee under the Insolvent Laws. The right on the part of a single creditor to take out an attachment-execution for his own separate benefit would have been inconsistent with this intention, that all creditors should participate equally; and therefore, under the Act of 1836, an attachment-execution could not issue against an insolvent corporation, but sequestration was the exclusive mode of proceeding.<sup>5</sup> The plaintiff has no control over the process.<sup>6</sup>

But a subsequent act<sup>7</sup> authorizes the issue of an attachment-execution on a judgment against any corporation, other than a municipal corporation. And an insolvent improvement company is within the provisions of this act.<sup>8</sup>

By the Act of April 11th 1862, § 1,<sup>9</sup> where a corporation has been incorporated by this State, but its principal business office is out of the State, and none of its officers, upon whom process can be served under existing laws, reside in the State, actions may be commenced against such corporation in any county where it at any time transacted its business, or where its land or works were located;<sup>10</sup>

<sup>1</sup> Act 16th June 1836, § 75, Purd. Dig. 200, pl. 47, Pamph. L. 775.

<sup>2</sup> Moore's Appeal, 14 Wright 250.

<sup>3</sup> Act 16th June 1836, § 74, Purd. Dig. 200, pl. 46, Pamph. L. 775.

<sup>4</sup> *Vide post*, Vol. II., "Corporation."

<sup>5</sup> *Ridge Turnpike v. Peddle*, 4 Barr 490, per GIBSON, C. J.

<sup>6</sup> *Chaddocks v. Ins. Co.*, D. C. Phila., 20 Leg. Int. 124.

<sup>7</sup> Act 20th March 1845, § 4, Purd. Dig. 436, pl. 37, Pamph. L. 489.

<sup>8</sup> *Reed v. Penrose's Executrix*, 12 Casey 214. And see the dissenting opinions in this case, 2 Grant 472.

<sup>9</sup> Purd. Dig. 1270, pl. 1, Pamph. L. 449.

<sup>10</sup> As to the mode of service, see *ante*, 264.

and any property of any description of such company, within the State, shall be liable to attachment and execution; and any such property which would be liable to attachment and execution, if the said office were located in this State, shall be taken to be in this State for such purpose, and shall be liable to levy and sale, in the same manner as if the officers of said company resided in the county in which by this act the action may be brought.

II. *Municipal corporations—Mandamus execution.*—Execution on a judgment against a county can be had only in the following manner: The court in which the judgment was obtained, or to which it has been removed by transcript from a justice, may issue thereon a writ commanding the commissioners of the county to cause the amount thereof, with the interest and costs, to be paid to the party entitled to the benefit of such judgment out of any moneys unappropriated of such county, or if there be no such moneys, out of the first moneys that shall be received for the use of such county, and to enforce obedience to such writ by attachment.<sup>1</sup> And the like proceedings may be had upon a judgment against a township, to enforce payment out of the township funds, according to the circumstances of the case.<sup>2</sup> And this process applies to cities, though not expressly named in the act.<sup>3</sup> Execution against boroughs may be had in the manner provided by law in the case of townships, and the writ shall be served upon the burgess, or treasurer, or secretary of the town council of the borough.<sup>4</sup>

This act presents a method by which those having judgments against these *quasi* corporations may have a remedy by means of the remedial writ of *mandamus*; and as these corporations have no property which could properly be made subject to levy and sale, it restrains the use of other process. It is but the legislative extension of the common-law remedy of *mandamus*, and a modification of the process to suit the peculiar functions and officers of these anomalous corporations, and make it more simple in practice; as it issues only where a court of record has given a judgment which makes it the duty of the officers of the corporation to pay a certain sum of money, it dispenses with the form of an alternative *mandamus*: it assumes that the officers whose duty it was to lay and collect taxes sufficient to pay all just demands against the corporations have done so, and gives the party aggrieved a right to satisfaction out of the moneys in the treasury unappropriated; and if there be no such moneys, then out of the first moneys that shall be received.<sup>5</sup>

*Where it lies.*—It lies upon a judgment, original or transferred, of a court of record;<sup>6</sup> in the act relating to boroughs<sup>7</sup> the words are "any judgment."

*Against what.*—The real estate, which is generally the only pro-

<sup>1</sup> Act 15th April 1834, § 6, Purd. Dig. 203, pl. 11, Pamph. L. 538.

<sup>2</sup> Ibid., § 7, Purd. Dig. 203, pl. 12.

<sup>3</sup> Monaghan v. City of Phila., 4 Casey 207; Evans v. City of Pittsburgh, U. S. C. Ct., 19 Leg. Int. 4.

<sup>4</sup> Act 2d April 1860, § 1, Purd. Dig.

122, pl. 100, Pamph. L. 589.

<sup>5</sup> Evans v. City of Pittsburgh, U. S. C. Ct., 19 Leg. Int. 4, per GRIER, J.

<sup>6</sup> Act 15th April 1834, § 6, *supra*.

<sup>7</sup> Act 2d April 1860, § 1, Purd. Dig. 122, pl. 100, Pamph. L. 589.

perty of a municipal corporation, being protected on grounds of public policy from levy and sale in execution,<sup>1</sup> this writ is intended to reach the revenues of such bodies. But where a corporation has stocks and other property not held for public use, the reason for the prohibition of levy and sale in execution fails, and such property may be sold under a *fi. fa.*<sup>2</sup>

*The form of a mandamus execution may be found in Smith.*<sup>3</sup>

In the case of a county the *mandamus* is directed to the county commissioners,<sup>4</sup> in that of a township, to the supervisors,<sup>5</sup> in that of a city, to the city treasurer, who is the custodian of the money of the corporation,<sup>6</sup> and in that of a borough, to the burgess or treasurer, or secretary of the town council.<sup>7</sup>

*Effect.*—Upon being served, the corporate officers have no discretion, their only duty is obedience to the process of the court.<sup>8</sup> Payment upon such writ, issued by a court of competent authority, would be a sufficient voucher for the treasurer, even though the city councils had not made any appropriation for such payment.<sup>9</sup>

A township cannot have a stay of execution on the plea of freehold.<sup>10</sup>

<sup>1</sup> Act 15th April 1834, § 6; *Wilson v. Commissioners of Huntingdon Co.*, 7 W. & S. 199; *Schaffer v. Cadwalader*, 12 Casey 126; *Evans v. City of Pittsburgh*, *ubi supra*.

<sup>2</sup> *Evans v. City of Pittsburgh*, *ubi supra*; *Oelrichs v. City of Pittsburgh*, U. S. C. Ct., 17 Leg. Int. 4.

<sup>3</sup> *Smith's Forms* 124, pl. 1, 682, pl. 2. See also *Hewson v. Kensington*, 2 P. L. J. 301.

<sup>4</sup> Act 15th April 1834, § 6.

<sup>5</sup> *Smith's Forms* 124, pl. 1.

<sup>6</sup> *Monaghan v. City of Phila.*, 4 Casey 207.

<sup>7</sup> Act 2d April 1860, § 1, *Purd. Dig.* 122, pl. 100, *Pamph. L.* 589.

<sup>8</sup> *Com. v. Taylor*, 12 Casey 263.

<sup>9</sup> *Monaghan v. City of Phila.*, 4 Casey 207.

<sup>10</sup> *Morgan v. Commissioners of Moyamensing*, 2 Miles 397.

## CHAPTER XXIV.

### OF MOTIONS AND AUDITA QUERELA.

#### 1. *Motions.* P. 1160.

Purpose of motion.  
 Must be in writing and filed.  
 Motion for rule to show cause.  
 Depositions on adverse side not received on motion, but parties fully heard on argument.  
 Affidavit for rule.  
 Copy of rule to be served.  
 Continuance of rule.  
 Difference between English and Pennsylvania practice on showing cause.  
 Argument list.  
 Rules of course.  
 Rule to take depositions.  
 Notices, on whom to be served.  
 Rules of District Court (note).  
 Summary relief on motion.  
 The suitor or witness privileged from arrest.  
 The defendant, from ejectionment when willing to surrender land.

#### 2. *Audita Querela.* P. 1164.

Nature of audita querela.  
 Advantage of audita querela.  
 In what court audita querela lies.  
 Beale v. Commonwealth.  
 Application for audita querela in England.  
 Practice in audita querela English and American.  
 Stephens v. Stephens.  
 Cases in which relief will be granted by audita querela. Opinion per LOWME, J.  
 Discussion of the form of the remedy.  
 Its application in our practice.  
 Schott v. McFarland.  
 Writ not obsolete, but granted.  
 Brief of cases in England and in the United States.  
 Writ of audita querela will be used in Pennsylvania.  
 Practice on moving for and granting audita querela.  
 Form of petition for audita querela.

#### 1. *Motions.*

HAVING in the preceding chapters traced the progress of the cause from its commencement by the issuing of the original process, to the award of the judicial consequence of either party's success, and the modes of enforcing it by execution, we shall close this volume with a few additional notes on the subject of motions and their incidents, with a view to the introduction of some decisions and rules of court, hitherto unnoticed. We do not pretend to give an enumeration of the various motions which are or may be made in our courts, as is done in the English books of common-law practice, because, from the liberality of our practice, and the absence of a Court of Chancery in the State, a much more extensive use is made of motions than would be allowable in the courts of law in England. We may, therefore, quote, in the present place, the language of an English writer, who wished to excuse himself from entering into a detail of the practice in chancery, as suitable to express the reasons which prevent us from undertaking an account of all the exigencies which may be met through the medium of motions in our courts: "The minutiae of practical business can only be taught by practice; yet, in the common law proceedings, the books are generally very accu-

rate, and will, on reference, furnish the necessary information. But it is not so in chancery practice. This is not carried on with that exactness and precision with which the practice of other courts must be conducted; *when any difficulty arises, motions are generally resorted to*, the result of which depends on the circumstances which come before the court; and with the acquaintance of only one party's case, it is not easy to determine what that will be, till the contents of affidavits, the state of facts, and other proceedings, are known."<sup>1</sup>

A motion is an application to a court by a party or his counsel; and the order made by a court on any motion, when drawn into form, is called a rule. A motion is either for a rule absolute, in the first instance; or, it is only for a rule to show cause; or, as it is frequently called, a rule *nisi*, which is afterwards discharged or made absolute by the court, on argument. By the general practice, all motions made by counsel must be put in writing, and delivered to the prothonotary, to be entered on the minutes and filed, the time of delivery to be endorsed by the prothonotary. Motions are of a civil or criminal nature. Rules for attachments are the only criminal rules granted which have any relation to a civil suit.<sup>2</sup>

On a motion for a rule to show cause, depositions on the adverse side will not be received; when the rule applied for is granted, upon proper grounds shown, the adverse party, with his depositions, will be fully heard on the argument.<sup>3</sup> The affidavit of a party is sufficient to lay a ground for a rule to show cause.<sup>4</sup>

When a rule, whether absolute, or to show cause, has been obtained, a copy of the rule must be served on the opposite party or his attorney. If there be any irregularity in the service of a rule *nisi*, it will be waived by the party's afterwards appearing and showing cause against the rule.<sup>5</sup> The rule thus granted, requires the opposite party to show cause upon some day certain in term, at the discretion of the court. When a rule is entered, and no day of hearing is fixed, it is returnable to the next term, or in the District Court, on the succeeding Saturday.<sup>6</sup> If the rule be to set aside proceedings for irregularity, and to stay proceedings in the mean time, it suspends them all, for all purposes, until the rule is discharged;<sup>7</sup> and if any proceedings, directly or collaterally, be had in the cause, in the mean time, the court, upon application, will set them aside.<sup>8</sup> A decision, by which proceedings are set aside, disposes of all subsequent motions respecting the proceeding so treated.<sup>9</sup>

Upon the day appointed by the rule, the opposite party must show cause against it, unless by consent, or by the order of the court, it stand over until another day in the same term. Either party, however, if not prepared to support, or show cause against the rule, may move that it be enlarged to a future day in the same or next term.

<sup>1</sup> Advice on the Study of Law, pp. 85-6. Am. ed. 1811.

<sup>2</sup> 2 Arch. Pr. 266.

<sup>3</sup> Snyder v. Castor, 4 Yeates 443.

<sup>4</sup> Hoar v. Mulvey, 1 Binn. 145.

<sup>5</sup> Tidd's Pr. 445.

<sup>6</sup> Desler v. Burden, 1 Browne 220. See *ante*, 844, where motions to stay executions are treated in full.

<sup>7</sup> 4 T. R. 176.

<sup>8</sup> 2 Arch. Pr. 267.

<sup>9</sup> Etter v. Edwards, 4 Watts 63.

But it is not, by any means, of course, that the court should thus enlarge a rule; sufficient grounds must be stated to induce them to do so.<sup>1</sup> If the application be made by the party who obtained the rule, the court usually grant it where it is in his own delay; but not where it would have the effect of detaining the opposite party in custody, nor in other cases, without consent or some evident necessity: if moved for by the opposite party, the court will frequently enlarge it upon terms; or if the rule were not served in time to give the party an opportunity of showing cause against it, he may demand that the rule be enlarged as a matter of right.<sup>2</sup> If it be enlarged to a subsequent term, it is called on in its order upon the motion or argument list; but if it be enlarged, or stand over to another day in the same term, either party may bring it on, upon the day so appointed, by moving to discharge the rule, or to make it absolute.<sup>3</sup>

Upon the day appointed for showing cause, or when the rule is reached on the list, cause is to be shown; but not as in England, by the counsel against the rule, but by him who has taken it; except in rules to show cause of action, when the plaintiff's counsel, before the defendant's counsel proceeds, reads his affidavit, which (independently of the rules of the District Court, which will be examined presently) is said to be the uniform practice of Pennsylvania.<sup>4</sup> If no cause be shown, when the rule is called by the court for argument, the court, on affidavit of service (though, perhaps, hearing the counsel in support of the rule first), will, in their discretion, make it absolute. A copy of the rule, thus granted, should be served on the opposite party or his attorney. If counsel on neither side attend, when the cause is called on, it loses its place, and the court will not return to it, until they have gone through the list, and, beginning it anew, come to it a second time. It may be proper to add, that causes are put down for argument on the list, according to the respective terms and numbers of the actions, and not according to the dates of the motions and rules.<sup>5</sup>

Rules by consent of parties, or their attorneys, are rules of course, and are entered by the prothonotary on filing them. All agreements of attorneys, touching the business of the courts, shall be in writing, otherwise the court will pay no regard to them.<sup>6</sup> Even an agreement by counsel to abide by the opinion of a professional gentleman, will be supported and enforced by the court.<sup>7</sup>

The general practice is, that on all motions or rules to show cause, on the hearing of which facts are to be investigated, the testimony of the witnesses is to be taken by depositions in writing, before a judge, justice of the peace, alderman, or an examiner, appointed by the court, upon reasonable notice in writing to the opposite party,

<sup>1</sup> 2 Arch. Pr. 267-8.

<sup>2</sup> Ibid., Tidd's Pr. 447-8; and see 1 Smith's Rep. K. B. 199.

<sup>3</sup> 2 Arch. Pr. 268.

<sup>4</sup> McCarnay v. McCamm, 2 Browne 40.

<sup>5</sup> Desler v. Burden, 1 Browne 214.

<sup>6</sup> Rule 10, D. Ct. Phila.; Rule 24, C. P. Phila. 1824; Shippen's Lessee v. Bush, 1 Dallas 251.

<sup>7</sup> Cahill v. Benn, 6 Binn. 99; see Galbreath v. Colt, 4 Yeates 551.



or his attorney; and no witnesses will be examined at the bar, but by a special and previous order of the court.

A rule to take depositions is always implied in a rule to show cause, as in case of a rule to show cause why an attachment should not be quashed, the facts, if disputed, are to be ascertained by affidavits.<sup>1</sup> The affidavit of a party, though it may lay a ground for a rule to show cause, cannot be heard on the argument of that rule; but proof must be produced from a different quarter, and throughout the State.<sup>2</sup> On the hearing of any motion or application, after a rule to show cause has been granted, no affidavit will be read, unless notice has been given to the opposite party, that an opportunity may be afforded to cross-examine.

The general rule is, that all notices, where the party has a known attorney, may be given to that attorney or his agent;<sup>3</sup> but where a rule of court requires notice to be given to the opposite party, notice to his attorney is not sufficient,<sup>4</sup> unless there be an express recognition of the notice on the part of the attorney. But service of notice on the attorney, under such a rule, is sufficient in the case of depositions, unless he object at the time of service, and his silence is equivalent to an agreement which will bind his client.<sup>5</sup> Why this construction should be confined to the case of depositions is not very apparent; for, if we examine the reason which dictated it, namely, that the exemption of the attorney is a personal privilege, which he may waive at pleasure, we shall find it applicable to every case in which the transmission of notice by an attorney to his client involves any trouble or responsibility.<sup>6</sup> But though there has been considerable oscillation of judicial sentiment on the subject, the old rule may be now considered to be virtually reaffirmed, that even where a rule of court directs notice to be served on a party, service on the attorney is sufficient, where the attorney, on receiving notice, makes no objection.<sup>7</sup>

In some cases the court will interfere, or grant relief on motion, without laying a party under the necessity of proceeding in other more circuitous and expensive modes peculiar to the English practice. Of some of these, mention having already been made, we will here only refer to them, in order to avoid repetition.<sup>8</sup>

<sup>1</sup> *Coulon v. De Lisle*, 1 Browne 256.

<sup>2</sup> *Hoar v. Mulvey*, 1 Binn. 145; s. r. *Coxe v. Nicholls*, 2 Yeates 546.

<sup>3</sup> *Dunkin v. Calbraith*, 1 Browne 15.

<sup>4</sup> *Nash v. Gilkeson*, 5 S. & R. 352.

<sup>5</sup> *Ante*, 503.

<sup>6</sup> See *Newlin v. Newlin*, 8 S. & R. 41.

<sup>7</sup> See *ante*, 503.

<sup>8</sup> *Vide ante*, 237-8, 503-4, &c., 625, &c.

The rules of the District Court in this respect are as follows:—

LII. Upon rules to show cause of action, or to dissolve foreign attachments, the party who is to show cause is to begin and conclude; in all other cases, the party who obtains the rule to

show cause is to begin and conclude.

LIII. Unless otherwise specially directed by rule of court, two counsel, but not more, may be heard on each side of a cause or matter on the motion or argument list. The counsel of the party having, according to the practice of the court, the right to begin, shall state the grounds relied upon, and cite all the authorities intended to be adduced in their support. The counsel of the opposite party shall then be fully heard; if two, they shall follow each other in order of seniority. The counsel who began, if alone, shall reply: if two are concerned on that side, this duty shall devolve upon his colleague.

Where a suitor or witness privileged from arrest, has been taken on a *capias*, the court, of which the arrest is a contempt, will discharge him, though the court from which the process issues have refused to discharge. It is the privilege of the court, for the protection of the party to, whom the common law gave a writ of privilege in that case, in lieu of which, summary relief on motion is now substituted, and this cannot be denied, on proper grounds shown.<sup>1</sup> Another case, in which relief would be granted in a summary manner on motion, is, where a party, having recovered in ejectment the whole land for which the action was brought, uses no means whatever to enforce the judgment, but brings a second ejectment; here, if the defendant were willing to surrender the land, the court would interfere on motion to protect him from the costs of a new ejectment.<sup>2</sup>

## 2. *Audita querela*.

The writ of *audita querela*, which is the commencement of an action somewhat in the nature of a bill in equity, to be relieved against some oppression of the plaintiff, states that the *complaint of the defendant has been heard*, and setting forth the matter of the complaint commands the court to call the parties before them, and after having heard, to do justice between them, *e. g.*, in case of an execution awarded or likely to be awarded against the party upon some ground of injustice pointed out to the court.<sup>3</sup> The liberality of the courts in granting relief upon motion, and the greater frequency of applications to the Courts of Equity, have, in England, almost superseded the use of the writ of *audita querela*; as it is there held that relief may be granted upon motion in cases proper for an *audita querela*, where it is not granted upon some foreign

The reply is to be confined to an examination of the points made by the opposite counsel.

LIV. Upon every rule to show cause why judgment should not be entered for want of a sufficient affidavit of defence, the plaintiff shall furnish to the court before the hearing of the rule a copy of the bill, note, bond, book entries, claim, or other instrument of writing, or the affidavit of loan filed by the plaintiff, and also a copy of the affidavit of defence filed by the defendant. *And whenever the copies are not furnished as aforesaid, the rule shall be discharged.*

LV. In motions and rules for new trials, the party who obtains the same, shall furnish to each of the judges a copy of the reasons filed; and on application to amend the pleadings, the party making the application shall furnish for the use of the court one copy of the pleadings on file, and of the proposed amendments.

LVI. In all arguments on the reports of referees, copies of the report, and of the exceptions thereto, if any be filed, shall be furnished to each of the judges before the commencement of the argument. If exceptions be filed by the defendant, this duty shall devolve on

him; otherwise on the plaintiff.

LVII. In all cases on the motion and argument lists, the party who is entitled to begin shall furnish to each of the judges a paper-book, containing a full and distinct statement of all facts conducive to a ready comprehension of the matter to be argued.

LVIII. On the third calling of the general motion and argument lists, all cases not answered to shall be finally disposed of; that is to say, demurrers, motions in arrest of judgments, and exceptions, shall be stricken from the list. Motions for rules for new trials, to take off nonsuits, rules for new trials, and reserved points, shall be considered as submitted without argument, and decided upon the report of the judge before whom the case may have been tried. Rules for judgments, and all other rules "*nisi*," shall be discharged.

<sup>1</sup> United States v. Edme, 9 S. & R. 149.

<sup>2</sup> Rambler v. Tryon, 7 S. & R. 90.

As to motions to obtain equitable relief in our courts, either through their immediate decree, or the medium of feigned issues, *vide supra*, 79, 278-9. As to motions to open judgments, *supra*, 651

<sup>3</sup> Sherid. Pr. 609.

matter, as a release ; but where the ground of relief is a release, when there is some doubt about the execution, or some matter of fact which cannot be clearly ascertained by affidavit, and therefore proper to be tried, the courts there have driven the defendant to his *audita querela*.<sup>1</sup> But it is probable from the language of Mr. Justice DUNCAN, in delivering the opinion of the Supreme Court,<sup>2</sup> that no distinction of a similar nature would be observed in Pennsylvania. For he says, that "wherever the writ of *audita querela* would lie, the court would grant relief on motion," and, that "so universal is the course of granting summary relief, that it has driven out of use, and rendered obsolete, the writ of *audita querela*;"<sup>3</sup> and further, that in a case wherein *audita querela* would lie, but in which the court had interposed on motion, if they doubted the proof, they would direct an issue to try the fact.<sup>4</sup> But the writ is not obsolete;<sup>5</sup> and it has been decided, in the District Court in Philadelphia, that it might issue in Pennsylvania, and this even after the refusal of summary relief by the court on motion upon the same grounds.<sup>6</sup> But the writ will not be allowed where the petition does not set forth the grounds of relief with such certainty as would be subsequently held good on demurrer.<sup>7</sup> It was intimated that the writ should not issue upon matters which constitute a mere equitable defence, such as would not be cognisable at law.<sup>8</sup> Thus where a petition for a writ of *audita querela* averred an agreement to accept a certain sum in compromise of a larger judgment, and an actual receipt of the greater part, with a tender of the balance, it was not error to refuse the writ.<sup>9</sup>

With regard to this writ, however, there is a peculiarity worthy of notice, which involves an advantage that does not appear to attend on the remedy by motions in lieu of it. In England, an *audita querela* is a commission to the judges to examine the cause, and is *in nature of trespass*; and *damages* are given if the execution be without right.<sup>10</sup> Now in the case of a motion for relief, it is very clear that the judges would not award damages to the defendant, however they might protect him from the plaintiff's unjust oppression, and it is equally clear, that if an issue were directed to try the matter of fact, the jury could not assess damages, but would be confined to passing upon the fact;<sup>11</sup> but in *audita querela*, if the issue be to the country, damages may be assessed.

When the court will interfere on such a motion, it will stay the execution until justice can be done, and an issue being directed, on the plea of payment with leave, &c., it is thus put in the power of the court to try and decide *equitably* on the matter arising subsequent to the judgment, the same as if it were invested with chancery

<sup>1</sup> 2 Saund. 148, c.

<sup>2</sup> Share v. Becker, 8 S. & R. 239.

<sup>3</sup> Ibid. 242; Daly v. Derringer, 1 Phila. Rep. 324.

<sup>4</sup> Ibid.

<sup>5</sup> Witherow v. Keller, 11 S. & R. 274, Daly v. Derringer, 1 Phila. 324;

Share v. Becker, 8 S. & R. 242.

<sup>6</sup> Schott v. McFarland, D. C. C. P.,

1 Phila. Rep. 53.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid. Where an *audita querela* will lie in general, see Stephens v. Stephens, D. C. All., 1 Phila. Rep. 108.

<sup>9</sup> Keen v. Vaughan's Executrix, 12 Wright 477.

<sup>10</sup> 2 Saund. 148, b.

<sup>11</sup> Vide supra.

jurisdiction.<sup>1</sup> The jury, however, cannot find anything to be due to the defendant, and a verdict awarding a balance in his favor would be erroneous.<sup>2</sup> The utmost a defendant can ask on such an application for relief is, that he should be discharged from the judgment.<sup>3</sup> "In no case is the defendant entitled to a judgment for a sum of money, except where he has given matter of *defalcation* in evidence, and a balance is found in his favor."<sup>4</sup> The case from which the preceding rules have been extracted,<sup>5</sup> furnishes an example of an occasion in which an *audita querela* might have been resorted to with advantage; for the defendant might in that equitable proceeding have secured, in the shape of damages, the balance of money which upon a motion and issue was erroneously awarded him. The objections to such proceeding appear to be, its dilatoriness and expense. The first is incident to all legal transactions, but can be materially obviated by the assistance of the court, in framing judicious rules; but even where an issue is ordered after motion for summary relief, the issue must take the chance of delay which every other cause on the trial-list is exposed to, before it can be brought on for trial. The second objection, however it may avail in England, can hardly be admitted in this State, when the moderateness of its fee bill is considered. With regard to the execution, it is difficult to see a reason why the court should not stay it in this proceeding as in any other, without putting the party to the necessity of suing out a *supersedeas*.

*Audita querela* lies only in the court where the judgment is given, they having the best knowledge of all the proceedings in the same cause.<sup>6</sup>

<sup>1</sup> Harper v. Kean, 11 S. & R. 290; Beale's Executors v. Com., Ibid. 299.

<sup>2</sup> Ibid. 280.

<sup>3</sup> Ibid. 292.

<sup>4</sup> Per TILGHMAN, C. J., Ibid.

<sup>5</sup> Harper, et. al. v. Kean.

<sup>6</sup> 2 Bulst. 10; Beale's Executors v. Com., 11 S. & R. 299.

Judge LOWRIE has favored the editor of the third edition with the following full report of a very interesting case, on this head, decided by him in Pittsburgh, in 1848. It is retained in this edition although now reported in Phila. Rep.

E. W. Stephens v. A. C. Stephens, and the administrator of his wife, 1 Phila. Rep. 108. Where the court sets aside or opens a judgment, they will also set aside a sale of land made under it, though the sheriff's deed has been acknowledged, if it be still in the hands of the sheriff.

It is no objection to the setting aside a sheriff's sale, where the deed is still in the sheriff's hands, that a term has elapsed since the acknowledgment of the deed.

As to its own proceedings, this court

may properly grant the same relief on *motion*, that was formerly granted under the old practice, by *audita querela*, writ of error coram. nobis, and bill in equity.

The cases in which relief may be granted in these procedures.

When a judgment, on which a sheriff's sale is founded, is set aside, the setting aside of the sale follows as of course on the ground of *restitution*.

On petition and affidavit of W. C. Nelson, one of the heirs of Cornelia Stephens, late Cornelia Nelson, rule to show cause why the judgment should not be opened and the heirs permitted to take defence, and why the sale on the *levari facias*, and the acknowledgment of the sheriff's deed should not be set aside.

The material facts of the case are, that this is a *scire facias* on a mortgage given by Allen C. Stephens, and Cornelia his wife, on the 18th of January 1843, for \$3000 on the land of the wife, descended from her father. The wife, was a minor when the mortgage was executed. She was dead when the suit was brought, and at that time her heirs

were the brother and sisters of her father. The writ was served on her administrator, but he did not appear to make any defence—two *nilis* were returned as to A. C. Stephens. No notice was given to the heirs of the wife, and they were residing out of the State and did not hear of the proceedings until very recently. Judgment by default was entered for the amount due, execution issued, and the land sold to the plaintiff for \$2000. The sheriff's deed was acknowledged May 20th 1848, in April Term, but remained in the sheriff's hands until September 11th 1848, in July Term, when on the petition of W. C. Nelson, for the heirs and affidavit of the above facts, the presiding judge made an order at Chambers on the sheriff to withhold the delivery of the deed until the further order of the court. Allen C. Stephens died since the sale.

Messrs. Kuhn and Williams, for the rule, cited *Veneman v. Cooper*, decided in this court, and *Jackson v. Sternberg*, 20 Johns. 49.

Mr. Dunlop, *contra*, cites 4 Penn. St. Rep. 80; 1 Watts 491; 1 Yeates 40; 9 S. & R. 395; 10 Watts 22; 12 Pet. 488; 1 Wh. 21.

#### OPINION OF THE COURT.

LOWRIZ, J.—The motion in this case is objected to on account of want of interest on the part of these heirs, or because their interests are not affected by the judgment—the plaintiff not having chosen to make them parties to the proceeding, 1 Watts 491. The plaintiff, then, would seem to say, we did not buy the interest of Mrs. Stephens, because the deed is void as to her for non-age; we did not affect the title of her heirs by the judgment, for we did not make her heirs parties; we did not charge her personal representative, though we did make him a party, for this is a proceeding *in rem* for real property; we charged only the curtesy estate of A. C. Stephens, and that is all we got for our bid of \$2000, and now he is dead and that estate is ended; yet we insist on having our deed and paying our money. However singular this may seem, I think it is all the plaintiff could get by this deed.

But it is not very clear that the judgment has no effect as against the heirs. It is sufficient to justify their interference if the judgment would be but *prima facie* evidence that this is the deed of Mrs. Stephens. And as, in all controversies concerning land, the heirs

have a right to a writ of error or *audita querela* on a judgment against their ancestor, so they have a right to be heard in this form. And it may be of great importance to save the parties from having another knot added to the warp of their entangled web.

But it is further objected that the parties come too late in asking the interference of the court, because a term has passed both since the judgment and since the acknowledgment or confirmation of the deed. We do not think so. I cannot help thinking that the assertion so often made, that no court can reverse or amend its own final judgments for errors of fact or law, after the term at which they were entered, is, so far as our practice is concerned, little else than a humbug, useful only to frighten ignorance and rashness from meddling with matters too great for their comprehension.

It was applied in England to prevent alteration of the records after enrolment. But here they are never enrolled, and we have given the rule but little application. The fact is, we amend, open, and set aside judgments not only after a term, but after years, governed only by the facts and equity of the case and by wise cautions of the Supreme Court as to the rights of third persons. Even in England, in what is properly called amendments, the rule is beginning to be regarded as one rather of caution than of binding obligation. See *Richardson v. Mellish*, 11 E. C. L. Rep. 127; 3 T. R. 349; 4 Maule & S. 94.—Even as to errors in process and in the judgment, though formerly they were heard only on *audita querela* or on writ of error in the same court (*coram nobis* or *vobis*), or by the illiberal disposition of the courts of law, making the machinery of justice more important than justice itself, thrown into Chancery. These are now heard or remedied on motion, if the material facts be not doubtful, or the ground of relief doubtful in point of law. In the latter event, the court may still put the parties to their independent or collateral remedies.

But these forms of remedies can scarcely be said to be in use with us, though they are recognised as still existing 1 W. & S. 438; 1 Browne 82; 17 S. & R. 344; 1 Miles 46; 11 S. & R. 274, 290. Yet we arrive at the same results on motion, 8 S. & R. 235, and it is no just ground of complaint on the part of the plaintiff, at least, that the opening or setting aside of judgments is mere matter of discretion, and is not a subject

of error, for neither would the granting of *audita querela*, and a stay of proceedings thereon, be a subject of error, though a judgment under that process would be so, and so is our action subsequent to opening or setting aside judgments. Defendants might complain of an unjust refusal to open a judgment and let in a defence, if they could not still use the *audita querela*, or writ of error in the same court. But I do not know why these may not still be used, though their use is very uncommon, owing to the liberal use of our much simpler practice of granting the relief on motion: 11 S. & R. 290; 1 Rawle 323.

Chancery grants relief by injunction to stay proceedings where it is shown that a judgment is satisfied or was procured by fraud; or where it is used to enforce payment of a penalty; or where it is tainted with anything contrary to public policy, if the defendant had no chance of making his defence at law; or wherever, by fraud, accident, mistake, or otherwise, the plaintiff has an unfair advantage which would make the court an instrument of injustice; and in these cases, we grant relief much more simply and beautifully on motion, by "the court laying its hands upon the action," (9 Watts 94,) and preventing its execution, if in equity the party is entitled to relief.

The writ of error in the same court (*coram nobis* or *vobis*), lies to correct errors of fact, as that the party was under age, or coverture; or was dead at the time of the verdict or judgment; or for clerical errors in process; or errors in the execution of process. For all these cases we grant relief on motion.

The writ of *audita querela* lies for release, payment, or other discharge after verdict or judgment; where the sheriff or bail is made liable by judgment, and the principal debt is afterwards satisfied, or judgment reversed; where there are several judgments for the same claim and one is satisfied; where judgment is entered against a minor after two *nihilis*; where a party has not been served with process; where no execution is issued on a forged statute merchant or staple (the judgment-bond takes their place with us), or on a statute tainted with usury, or other matter contrary to public policy; or one that is connected with a satisfied defeasance; where payment is improperly obtained; to release from execution a discharged bankrupt; where a judgment is obtained in fraud of an

existing agreement as to the conduct of the suit; where execution is improperly issued or erroneously executed, and where one whose lands are equally liable with the lands of another wishes to obtain contribution.—This is the English and American practice on *audita querela*, though it is now the almost universal practice to grant the same relief on motion. With us it is the only mode in use.

It must, therefore, be apparent that this is such a case as would be relieved anywhere in some form, and here it must be done on motion. I take pleasure in giving credit to the counsel for the heirs in this case, for having prosecuted their claims for relief by petition, and in a manner more than usually direct and lucid.

Then as to the acknowledgment of the sheriff's deed. In the case of *Vane-man v. Cooper*, this court decided that the mere fact of the acknowledgment of the deed without delivery, is not of itself sufficient to take away the power of the court to arrest an unjust use of its process; that the deed is still in the power of the court while it is in the hands of its officer; and I know not why the confirmation of a sale is not as open to subsequent objection before it is completely executed as other judgments. It is more summary than most of them. What has been said as to the opening and setting aside of judgments is sufficient to show that the fact of a term having passed is no valid objection.

But the parties are entitled to have the sale set aside on the doctrine of restitution alone. This arises whenever a party has lost anything by the process of the court, and that process is afterwards reversed or set aside. The rule is, that whenever it is in the power of the court to restore the specific thing lost, it will do it. If it cannot do this, it will do the best in its power: 2 S. & R. 58; Yelv. 179.

ORDER.—On hearing of the parties by their respective counsel, it is ordered, for the reasons appearing in the petition on which this proceeding is founded, that the judgment in this case be opened, on the heirs of Cornelia Stephens having their appearance entered by counsel, and that the sale of the land on the *levari facias* be set aside, the acknowledgment of the sheriff's deed rescinded, and the deed cancelled.

Note.—In order to obtain the sheriff's deed, E. W. Stephens afterwards filed

a bill in equity to compel the sheriff to deliver the deed, on the ground that the court had no power to order its cancellation.—This bill was dismissed by the court, and the decree thereon was affirmed by the Supreme Court.

Equally interesting is the following case in the District Court of Philadelphia:—

*Schott v. McFarland*, 1 Phila. Rep. 53. Sur rule to show cause why execution should not be set aside, judgment opened, and defendants let into a defence.

Defendants asked to open a judgment entered on a bond given for the purchase-money of land in Mercer County sold to them in 1845, by deed, with general warranty from plaintiff's assignor, and gave in evidence that one Morrison, the original owner, had in 1808 laid out a town upon the property, and sold 60 or 70 lots to purchasers, whose deeds were recorded. They also proved that parts of the property had been sold for taxes, as the property of these purchasers in 1848, when defendants had bought in many of the lots.

Mr. *W. H. Rawle*, for the rule.—1. An outstanding title in third persons being a good defence in Pennsylvania to an action for the purchase-money, *Withers v. Atkinson*, 1 Watts 248, *Ludwick v. Huntzinger*, 5 W. & S. 58, defendants are entitled to relief if they can here show what would constitute such a defence. They need not prove eviction: *Hart v. Porter*, 5 S. & R. 204; *Share v. Anderson*, 7 S. & R. 43, 61. As to the actual claim under the outstanding title, possession follows title in unseated lands as these are shown to be by the tax sales: *Mather v. Trinity Church*, 3 S. & R. 514; 8 Johns. 263; 9 Johns. 377: and the purchasers under provision are to be deemed in possession.

Defendants should not here be driven to this action on the warranty. *Cresson v. Miller*, 2 Watts 272. The distinction between general and special warranty will not avail plaintiff. *Lucas v. Wolbert*, 10 Barr 73.

Mr. *Porter*, contra.—There is no evidence of any one *actually claiming* title under Morrison's deed, and the authorities are express: *Ludwick v. Huntzinger*, 5 W. & S. 51; *Bradford v. Potts*, 9 Barr 37; *Lighty v. Shorb*, 3 Pa. R. 447. Defendants are actually in possession of the property, and how can they set

up a legal presumptive possession in other persons? Besides, the record of the deeds to Morrison, was constructive notice to defendants.

*Per curiam*.—This is a judgment on bond and warrant, originally given by defendant to the Rev. Dr. Engles, as the consideration in part of a tract of land in Mercer county in this State. The defendant asks to be let into a defence on the ground of failure of consideration, that the title of the vendor to a part of the tract was not good.

It appears that one Joseph Morrison, who conveyed to Dr. Engles in 1845, had laid out, as early as 1808, a town, to be called *Shenango*, on a part of the premises, and made divers conveyances to persons of lots in the said town. The project fell through, no claim has ever been made by any of these persons, and indeed a large part of their title, good or bad, has been extinguished by the defendants suffering the ground to be sold for taxes accrued since the conveyance to them, thus vesting in them a paramount indisputable title. It was held in *Ludwick v. Huntzinger*, 5 W. & S. 51, that, to rebut the presumption arising from acceptance of a deed and giving bond, it must be shown to constitute a defence to an action for the purchase-money, that the title is positively bad by proving a superior and indisputable title in another person *asserting such title*. The same law has been distinctly recognised in the later case of *Bradford v. Potts*, 9 Barr 37. Indeed, substituting the constructive notice in the present case by the recording of Morrison's deeds for the town lots, for the actual notice in *Bradford v. Potts*, the two cases are identical, for here the defendants had the precaution to require a covenant of general warranty. We may say, therefore, with the judge in *Bradford v. Potts*: "Here there was no covenant broken. The defendants accepted the title, and took their warranty with full knowledge of the alleged adverse title. They shall not detain the purchase-money when their possession has not been disturbed." Rule discharged.

After the above opinion was delivered, defendants' counsel presented a petition from them setting forth the above facts, and that there were "divers persons actually claiming title" to the property, and that defendants had been put to great expense in the purchase of some of these titles, and that others remained still outstanding in actual claimants,

and asked for an *audita querela*.—*Per curiam*. "Is not the writ said to be obsolete in 6 Barr? And can a party have it after application for summary relief on motion? But take the rule." Recognisance was entered to prosecute with effect.

March 23.—Mr. *W. H. Rawle*, for the rule.—In *Curtis v. Slosson*, 6 Barr 267, the court, in saying that the writ of *audita querela* is not in use, meant no more than did *TILGHMAN*, C. J., in *Harper v. Kean*, 11 S. & R. 290, viz.: that it was not frequently resorted to. In the case preceding, he observed, that "if issued he presumed no lawyer would question its legality." The writ is more used now in England than it has been for many years prior to the present century.

Though always recognised, Lord Porchester *v. Petrie*, reported in note to 2 Wms. Saund. 148, and as "a proper method and the most unexceptionable one," 4 Burr. 2287, it had been seldom used, owing to the growing practice of giving relief on motion, 1 Lord Raym. 439, 2 Strange 1075, &c., though even then, if the relief were questionable, the party was still turned to his *audita querela*: 1 Lord Raym. 439; 12 Mod. 584, 340. Of late, it has been more used. *Giles v. Nathans*, 5 Taunt. 558; *Lister v. Mundell*, 1 B. & P. 269; 2 Marsh 37; *Baker v. Ridgway*, 2 Bing. 41, and 9 Moore 114.

And one has been issued in 1847, in *Giles v. Hutt*, 1 Exchequer R., *Meeson, Welsby & Hurlstone* 59, 701.

The writ has been recognised and employed in

*New York*.—*Wardell v. Eden*, *Coleman's Cases* 157; same case, 2 Johns. Cases, 258; *Baker v. Judges of Ulster*, 4 Johns. R. 191; *Bowne v. Joy*, 9 Johns. R. 221; *Brooks v. Hunt*, 17 Johns. R. 484; *U. S. Bank v. Jenkins*, 18 Johns. 305, &c.

*Massachusetts*.—*Lovejoy v. Webber*, 10 Mass. 103; *Little v. The Bank*, 14 Mass. 448; *Bracket v. Winslow*, 17 Mass. 159, &c.

*Connecticut*.—*Lathrop v. Bennett*, Kirby 187; *Luddington v. Peck*, 2 Conn. 700; *Hall v. Fitch*, 1 Root 151, &c.

*Maine*.—*Byant v. Johnson*, 24 Maine 304.

*Virginia*.—*Smock v. Dade*, 5 Rand. 639.

*South Carolina*.—*Longworth v. Screven*, 2 Hill 298.

*Mississippi*.—*Hicks v. Murphy*, Walk. 66; 7 How. Miss. 103

In the *United States Courts*, *Wilson v. Watson*, *Peters's C. C. R.* 269, and in *Vermont*, the Revised Statutes of 1839, cap. 37, expressly provide for it.

That the writ is *matter of right* is shown by all the authorities. See particularly *Coleman's Cases* 157, per *KENT, J.*, 1 M. W. & H. Exch. R. 701, &c.

An *audita querela* issued from this court in 1842. Another in 1845, and another in 1847.

(*Per curiam*.—We cannot consider this an open question, having issued such a writ from this court.)

The object of the writ, then, being to give the defendant a day in court, he cannot be deprived of that unless by laches: 2 Saund. 148, note. Granting relief on motion has grown into practice as *matter of convenience* to the defendant. An *audita querela* is as much matter of right at common law, as a bill of exceptions by statute, yet a party would never (in the absence of a previous rule of court such as formerly existed) be deemed to waive the latter by applying for a rule for a new trial.

The court may make a rule that they will not hear a motion to open a judgment unless a party waive his *audita querela*, but they cannot do so in a case before them. In the last case of *audita querela* here, a rule to open the judgment had been discharged.

Mr. *Porter*, contra.—Defendants' petition does not set forth the names of those now claiming title, nor how much is claimed, nor the amount of expenses incurred by defendants in purchasing the other outstanding titles. A *supersedeas* does not necessarily follow an *audita querela*, but is discretionary with the court: 1 Bac. Abr. 513. Nor should the writ be granted after a party has applied for summary relief on motion. *Giles v. Nathans*, *Lister v. Mundell*, *Smock v. Dede*, *Longworth v. Screven*, *Wilson v. Watson*, all cited on the other side.

*Reply*.—The petition comprises everything required in *Ludwick v. Huntzinger*. By entering recognisance, a party is entitled to a *supersedeas*: Fitzh. Nat. Brev. 238. It is on a second *audita querela* after nonsuit of the first that there shall be no *supersedeas*: Com. Dig. "Aud. Qu."

April 6. *Per curiam*.—The District Court which preceded the present organization of this court decided (though not, as we are informed, without great hesitation), that the writ of *audita que-*



*rela* might be used in Pennsylvania, and also that it might be resorted to after an unsuccessful effort to obtain the summary interposition of the court on motion. Were the question any longer *res integra*, we would now decide the latter point in the negative. Every consideration of equity and expediency requires, in our opinion, that the party should abide by his election. At least that where he has applied and been unsuccessful, he should not be entitled to a *supersedeas*. There is not wanting authority, or at least strong analogy, for such a course even by the strict common law practice in *audita querela*. If the *audita querela* be founded on a deed, that deed must be proved in court before a *supersedeas* shall be granted: *Langston v. Grant*, 1 Salk. 92; 12 Mod. 105. So, the writ shall not be allowed, nor a *supersedeas* thereupon, unless the release, &c., upon which it is founded be proved by the witnesses present in court: 1 Sid. 351. And indeed it is laid down in a book of authority (Com. Dig. "Aud. Qu." E. 5), that there shall be no *supersedeas* unless the *audita querela* be founded in writing. There is nothing inconsistent in refusing the *supersedeas*, for *audita querela* is an action in the nature of trespass; damages are given if the execution be without right (Com. Dig. "Aud. Qu." A). If the plaintiff in *audita querela* has judgment, he shall be restored to what he has lost: *Brown v. Burnett*, 1 Sid. 74; Anon., 12 Mod. 598. But there can be no restitution, unless the money remains in the sheriff's hands: 1 Kilb. 260, pl. 39. This court has followed, however, in the footsteps of their predecessors, and it is too late now to retrace. It is to be hoped that the Supreme Court will soon have the opportunity afforded them of deciding between conflicting opinions, and settle judicially the law and practice upon this interesting subject.

There is one point, however, not heretofore decided except it may be *sub silentio*, and upon which, as it was not raised or argued in the case before us, we will not now express any opinion: that is, how far a mere equitable defence, such as would not be at all cognisable at law, as an answer to the cause of action, even if it arose before judgment, can be made the ground of an *audita querela*. There may be sound reasons for holding that this antiquated proceeding shall not be used for other causes than is strictly allowa-

ble in the English courts; and it is certain that, for such a ground as is set forth in the case before us, the party would be driven in England into chancery for relief.

We decide this case, however, upon the ground that the complaint is not sufficiently certain. It would be useless to issue the writ which must follow the complaint, if upon demurrer it would be held bad. In *audita querela*, on a defeasance of covenants in an indenture, the declarations should set out the covenants and show performance specially: *Puttenham v. Puttenham*, 3 Dy. 297, pl. 25. Now it seems to us that the complaint in this case does not set forth with sufficient certainty the alleged equitable ground for the writ. It does not state any one person in particular who claims the land in question, nor does it specify with certainty what part is so claimed. These are matters which lie in the complainant's knowledge, and he ought to state them. Rule discharged.

The petition in this case, which is drawn with great care, is annexed as a precedent.

In the District Court for the City and County of Philadelphia. The suggestion, petition, and grievous complaint of James McFarland and John S. King sheweth and giveth the court here to understand, that on the tenth day of January, A. D. 1845, William M. Engles and Charlotte S. his wife, by indenture of that date, conveyed to said James McFarland and John S. King, a certain tract of land in the County of Mercer, and State of Pennsylvania, therein particularly described, containing five hundred acres with the usual allowance, &c., for the consideration of the sum of five thousand dollars; that said James McFarland and John S. King, on the day and year aforesaid, executed their certain bond (accompanied with a mortgage on said premises), in the penal sum of ten thousand dollars, conditioned for the payment of one thousand dollars at the time of the execution thereof, and the residue of four thousand dollars with interest thereon, in four years from the date thereof, and that the said James McFarland and John S. King paid the said sum of one thousand dollars. That before and at the time of the execution of said indenture and bond and mortgage, the said James McFarland and John S. King were given by said Engles to under-

stand and believe, and verily did understand and believe, that said Engles was seised in his demesne as of fee, of all the premises described in said indenture. That the said James McFarland and John S. King, since the execution of said indenture and bond and mortgage, have discovered that there was at the time of the execution thereof a superior and indisputable outstanding title to a large and valuable part of said premises so purported to be conveyed as aforesaid, then subsisting in divers persons actually claiming title thereto, to wit, by virtue of divers deeds executed to them by Joseph Morrison, the owner of said premises, prior to the alleged vesting of said pretended title in said Engles; and that the said James McFarland and John S. King have since been put to great expense in the purchase of some of said outstanding titles, and that other of said titles are still in divers persons actually claiming under them. That said Engles did commence proceedings by writ of *scire facias* on said mortgage in Mercer County, against the said James McFarland and John S. King; but on learning the nature and extent of the defence thereto, said proceedings have been discontinued.

That judgment has been entered on a warrant of attorney accompanying said bond, against said James McFarland and John S. King, in the said District Court to March Term, 1849, and a writ of *feri facias* issued thereon, and a *testatum* writ of *feri facias* issued to Mercer county. And although by virtue of the premises, the said James McFarland and John S. King were entitled to require the further execution of said writ of *feri facias* to be stayed, and that no further proceeding should be had thereon, as the said James McFarland and John S. King are by proper ways and means ready to make manifest, nevertheless one William Schott,

purporting to be assignee of said Engles (which said Schott had caused judgment to be entered and execution issued as aforesaid), not regarding the premises aforesaid, but continuing unjustly to oppress the said James McFarland and John S. King by reason of the judgment aforesaid, as aforesaid entered, hath directed the sheriff of Mercer county to proceed under color and pretence of said writ of *testatum fieri facias*, and levy upon the premises aforesaid, and make of said lands and tenements the amount for which judgment has been entered as aforesaid, with interest and costs of suit, refuses to cause proceedings to be stayed upon said suit, and endeavors unjustly to cause the premises aforesaid to be sold by color and pretence thereof, to the great and manifest damage and grievance of the said James McFarland and John S. King; wherefore they humbly implore this honorable court to grant them proper remedy in this behalf, by allowing them to have a writ of *audita querela* upon the premises against the said Schott, assignee of said Engles. And the said James McFarland and John S. King are willing and hereby offer to give and justify good and sufficient bail by two sureties according to law in this behalf. And they pray your honorable court that their complaint in this behalf being heard, the said Schott, assignee aforesaid, may be called before you, and the reasons of the parties being heard that you may cause full and speedy justice to be done to the said James McFarland and John S. King, as of right and according to the laws and custom of the commonwealth shall be proper and just to be done.

And the said James McFarland and John S. King, as in duty bound, will ever pray.

JAMES MCFARLAND.  
JOHN S. KING.

# I N D E X .

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- ABANDONMENT** of exemption, 819.  
    of levy, 979.
- Abatement**, pleas in, 442.  
    of writ, plea in, 444.  
    grounds for this plea, 444.  
    must relate to the person, to the court, or to the writ, 444.  
    to the person of the plaintiff, 445.  
    to the person of the defendant, 445.  
    to the declaration, 446.  
    to the writ, 446.  
    power of using these pleas much abated, 446.  
    when plea in abatement cannot be pleaded, 447.  
    plea in abatement and plea in bar cannot be filed together, 448.  
    must be verified by affidavit, 449.  
    second plea in abatement may be pleaded, 449.
- Absence** 608.  
    of counsel, 553-555.  
    of party, 557.  
    not a ground for continuance, 557.  
    exceptional cases, 557.  
    of witnesses, 55.
- Accident**, 62, 110.
- Account**, 78.  
    in equity, 64, 75.  
    where legal remedy is inadequate, 78.  
    between partners, 78.  
    interpleader, 78.  
    jurisdiction to enforce agent's contracts against principal, 78, 79  
    to set aside voluntary deed, 79.  
    specific lien, 79.  
    render, 82.
- Acknowledgment** of sheriff's deed, 1020.
- Action** for legacy charged on real estate, 645.  
    new after arrest of judgment, 619.  
    by and against particular persons, 759 (see Costs).  
    commencement of, 244.  
    against convicts, 351.  
    against joint defendants, 349.  
    against foreign corporations, 351.  
    by the agreement of parties without a writ, 351.  
    where one of defendants resides out of the State, 349.  
    consolidating, 420.
- Acts of Assembly**.  
    Act of 1703, as to payment of money into court, 435.  
        1705, costs, 736, 743, 752.  
        1705, as to defalcations, 583.  
        1705, as to exceptions, 626.  
        1705, as to set-off, 463.

*Acts of Assembly continued.*

- Act of 1713, costs, 725.
- 1713, as to equity, 46.
- 1722, as to equity, 46.
- 1722, as to writ of error, 681.
- 1767, as to trial or non pros., 528.
- 1772, equity jurisdiction over trustees, 47.
- 1772, as to writs of inquiry, 408.
- 1779, costs in replevin, 735.
- 1786, as to lost deeds, 47.
- 1789, as to Nisi Prius, 7.
- 1791, as to entry of satisfaction, 669.
- 1791, as to writ of error, 683.
- 1792, written contracts to sell land where vendor has died, 38, 48.
- 1798, as to production of books and papers, 544.
- 1806, costs, 726, 753.
- 1806, fee-bill, 766.
- 1806, as to filing opinions, 573.
- 1806, as to Nisi Prius, 7.
- 1806, settlement law, 354.
- 1806, stay of execution, 393.
- 1806, as to warrants of attorney, 400.
- 1806, as to writs of inquiry, 409.
- 1807, partition, 38.
- 1810, as to certiorari, 31.
- 1810, costs, 731, 746.
- 1810, costs on ground-rent, 731.
- 1812, as to nonsuit, 531.
- 1814, fee-bill, 766.
- 1814, costs, 731.
- 1814, as to depositions, 517.
- 1814, as to juries, 535.
- 1814, as to nonsuit, 579.
- 1818, power to compel trustees of charitable associations to account, 49.
- 1818, power to remove assignees, 49.
- 1818, settlement of accounts by assignees, 49.
- 1821, fee-bill, 765.
- 1821, as to forfeited recognisances, 38.
- 1824, costs, 722.
- 1825, fees, 766.
- 1825, power to appoint and discharge trustees, 49.
- 1825, settlement of accounts by trustees, 49.
- 1828, power to remove trustees, 49.
- 1829, costs, 738.
- 1829, power to compel settlement of accounts in domestic attachment, 49.
- 1831, power to dismiss assignees, 49.
- 1832, as to interpleader, 434.
- 1833, costs, 748.
- 1833, letters rogatory, 38.
- 1834, as to juries, 531.
- 1834, as to Nisi Prius, 10.
- 1834, organization of Common Pleas, 23.
- 1834, as to views, 537.
- 1835, as to affidavit of defence, 366.
- 1836, arrest, 256.
- 1836, as to affidavit of defence, 366.
- 1836, costs, 751.
- 1836, costs in quo warranto, 723.
- 1836, as to equity jurisdiction, 32.
- 1836, exemption, 809.
- 1836, as to interpleader, 427.
- 1836, mandamus and quo warranto, 38.

**Acts of Assembly, continued.**

- Act of 1836, as to nonsuit, 579.**  
 1836, as to remittitur, 704.  
 1836, as to set-off, 464.  
 1836, stay of execution, 393.  
 1840, account-render, 32.  
 1840, costs, 732.  
 1840, equity jurisdiction, 32.  
 1840, equity jurisdiction extended, 32.  
 1842, arrest, 256.  
 1842, as to affidavit of defence, 367.  
 1842, costs on appeal, 758.  
 1842, as to Nisi Prius, 10.  
 1843, as to judgment index, 632.  
 1844, fees, 767.  
 1845, costs, 746, 751, 759.  
 1845, costs, official bonds, 723.  
 1845, as to dower and partition, 33.  
 1845, equity jurisdiction, 32.  
 1845, equity jurisdiction extended, 32.  
 1846, as to evidence, 542.  
 1846, exemption, 810.  
 1846, as to nonsuit, 580.  
 1846, power of courts to grant charters, 38.  
 1848, discovery, 33.  
 1848, as to lateral railroads, 31.  
 1848, as to verdict, 583.  
 1849, exemption, 811.  
 1849, as to judgment index, 632.  
 1850, appeal from county commissioners, 31.  
 1851, as to entry of judgments over ten years old, 672.  
 1851, provision for vacancy in judgeship, 5.  
 1851, as to writ of error, 681.  
 1852, further provision in case of vacancy in judgeship, 5.  
 1852, power of court to change name, 38.  
 1853, power of court to decree sale, mortgage, or release of realty, 38.  
 1854, conferring equity jurisdiction on District Court, 22.  
 1856, as to filing opinions, 573.  
 1857, equity jurisdiction extended, 33.  
 1858, as to disputed boundaries, 33.  
 1858, interpleader, 38.  
 1859, as to disputed boundaries, 33.  
 1860, as to juries, 535.  
 1863, jurisdiction extended in cases of disputed boundaries, 33.  
 1863, jurisdiction of Common Pleas extended to general railroad law, 33.
- Equity legislation since 1836:—**  
**Act of June 13th 1840, extending the jurisdiction to—Fraud; Accident; Mistake; Account, 66.**  
 October 13th 1840, account render, 66.  
 April 6th 1844, bill to perpetuate evidence, 67.  
 May 6th 1844, bond must be given when injunction issued, 67.  
 March 17th 1845, appeals to the Supreme Court, 67.  
 April 16th 1845, extends Act June 13th 1840, 69.  
 April 8th 1846, no injunction against public works in Philadelphia granted until questions of title and damages be settled, 69.  
 April 10th 1848, extends equity jurisdiction to Lancaster and York, and extends jurisdiction of Supreme Court to discovery of facts, 69.  
 April 10th 1849, extends jurisdiction to Huntingdon, Bedford, Somerset, Blair, Cambria, and Mifflin counties, 69.  
 April 25th 1850, gives equity jurisdiction in case of coal lands, and over lost records, 70.  
 May 15th 1850, extends jurisdiction to Clearfield county, 71.  
 April 3d 1851, extends jurisdiction to Schuylkill county, 71.

*Acts of Assembly, continued.*

Act of April 8th 1852, explains jurisdiction of Supreme Court, 71.

April 23d 1852, extends jurisdiction to Tioga, Potter, McKean, Union, Juniata, Butler, and Elk counties, 72.

May 1st 1852, extends jurisdiction to Fayette county, 72.

February 26th 1853, extends jurisdiction to Bucks county, 72.

April 2d 1853, to Montgomery county, 72.

April 15th 1853, to Luzerne county, 72.

April 6th 1854, provides for a tariff of fees in equity in Alleghany county, 72.

April 26th 1854, extends chancery jurisdiction to the Sixth Judicial District, 72.

April 24th 1854, provides for an appeal from Wardens of Philadelphia, 72.

May 8th 1854, gives District Court of Philadelphia concurrent equity jurisdiction with Common Pleas, 72.

March 16th 1855, extends equity jurisdiction to Wayne county, 73.

April 18th 1856, extends jurisdiction to Carbon and Lehigh counties, 73.

April 26th 1856, extends jurisdiction to Tenth Judicial District, 73.

February 14th 1857, extends equity jurisdiction throughout the State, 73.

November 6th 1856, provides, that the commonwealth and cities and counties may have injunctions and appeals without security, 73.

April 6th 1858, provides for costs in equity in District Court of Philadelphia, 73.

April 15th 1858, extends equity jurisdiction in Philadelphia county to case of disputed boundaries, 73.

March 8th 1859, provides for the establishment of a tariff of fees in Beaver, Butler, and Lawrence counties, 73.

March 29th 1859, provides, that decrees in equity for the payment of money shall be liens, 73.

April 5th 1859, extends Act of April 15th 1858.

April 6th 1859, provides for the return of process on parties out of the jurisdiction of the court, 74.

April 13th 1859, extends jurisdiction to cases of partition in Alleghany county, 74.

Acts of April 5th 1862, and April 11th 1862, provide for service of process, and extend jurisdiction to corporation mortgages, 74.

April 14th and 15th 1863, extend jurisdiction to plank-roads; and disputed boundaries in Western District, 74.

April 22d 1863, and May 4th 1864, provide for sales by masters, fees, and amendments, 74.

February 14th 1866, appeals in cases of injunctions, 38.

Act of Congress of 1789, 146.

Administrators, judgment against, 647.

Admiralty, 143.

Affidavit of defence, the origin of the system, 366.

power of court to make rules regulating affidavits, 366.

classes of cases within the rule, 366.

the Act of 1835, § 2, 366.

1836, §§ 1, 14, 367.

1842, 367.

extended to the Common Pleas and Nisi Prius, 368.

extended throughout the State, but repealed subsequently and confined to certain enumerated counties, 368.

on hearing rule, copy of affidavit must be furnished court, 368.

instruments within the meaning of the act, bills, notes, bonds, instruments for the payment of money, judgments in other states, 368.

construction formerly given to the act, 370.

change in the rule of construction, 370.

- Affidavit of defence, *continued.***  
 filing copies, 372.  
 book debts, 372.  
 scire facias on judgments and liens, 372.  
 contracts for loan or advance of money, 372.  
 recognisances, 373.  
 municipal claims, 373.  
 filing suggestions of defence, 374.  
 parties, 374.  
 judgment when entered final, 375.  
 judgment for amount admitted to be due, 375.  
 admission by one of several joint defendants, 375.  
 filing the affidavit, 375.  
 the nature and character of the affidavit itself, 37.  
 facts must be stated, 377.  
 time and place when essential must be averred, 378.  
 construction of averments, 378.  
 particularity of statement, 379.  
 defendant's belief, 379.  
*prima facie* case for defendant sufficient, 380.  
 supplemental affidavits, 381.  
 when copy must be filed, 381.  
 copy of mortgage not required to be filed, but statement of  
 record will suffice under act, 381.  
 affidavit cannot be used for matter strictly preliminary, 383.
- After-acquired lands (see Execution).**
- Agreement to continue, 558.**
- Alderman (see Appeal, Costs on).**  
 (see *Certiorari*).
- Alias, 271.**  
*feri facias*, 934.  
*vend. ex.*, 1018.  
 (see *Execution*).
- Alienage of parties, 147.**
- Ambassadors (see Arrest).**
- Amendment, 557.**  
 after demurrer, 492.  
 in equity, 100.  
 in United States courts, 189.  
 of Constitution of 1850, as to election of judges, 4.  
 of judgment, 645.  
 of verdict, 582-584.  
 of writ of error (see *Error, Writ of, Amendment of*).  
 to bills of particulars, 424.  
 (see *Execution*.)  
 (see *Writ of Error, Amendment of*).
- Answer in equity, 99.**  
 (see *Attachment-Execution*).
- Appeal, at first reserved to king, 6.**  
 from county commissioners, 31.  
 from interlocutory decrees, 74.  
 from magistrates, 28-29.  
 from *Nisi Prius*, 12.  
 from Orphans' Court, 679, 696.  
 from taxation of costs, 769.  
 in Supreme Court, 689.  
 practice in, 29-31.  
 to Supreme Court, 676.  
 to Supreme Court in equity, 73.  
 trial of, 29.
- Appearance, 271.**  
 in United States courts, 178.
- Appraisement, demand of (see Exemption).**

**Arbitration.**

- costs of voluntary arbitration, 751.
  - under the English law, 751.
    - Act of 1836, 751.
  - when costs depend on the terms of submission, 752.
    - the rule of reference, 752.
  - arbitrators may order costs to be paid by either party, 752.
  - law of reference under Act of 1705, 752.
  - costs of referees under Act of 1806, 753.
  - exceptions under this act, 753.
- costs of compulsory arbitration, 754.
  - follow the jurisdiction of the court, 754.
  - Act of June 16th 1836, 754.
  - municipal corporations within the act, 754.
  - appellant must pay costs of former award, which has been set aside in absence of terms as to costs, 755.
  - costs abide the final event, 755.
  - payment of costs may be enforced, 755.
  - the system provided by statute as to the payment of costs, 755.
  - condition of the recognisance for costs, 756.
  - appeal from prothonotary's taxation of costs, 756.
  - each party may appeal from an award and have a jury trial, 756.
  - rules for determining when appellant shall recover his costs, and when defendant, 757.
  - general rule is that where judgment of an inferior court is reversed on error, costs in error are not recoverable; where judgment is affirmed costs are recovered, 758.
  - the effect of Act of July 12th 1842 on costs on appeal from award, 758.
  - Act of March 20th 1845, 759.

**Argument list (see Argument and Paper-Books).**

- in error, 697-698.
- argument-list and calling of the cases, 697.
- short causes, 698.
- paper-books, 698.

**Arrest, 1126-1136.**

- personal privilege from suit and from arrest, 246.
  - ambassadors, 246.
  - members of Congress, 247.
  - members of the state legislature, &c., 247.
  - corporators, 247.
  - soldiers, 247.
  - state militia, 247.
  - United States marines, 247.
  - women, 247.
  - executors, &c., 247.
  - lunatics, 247.
  - discharged insolvents, 247.
  - freeholders, 247.
  - proceedings in case of a wrongful arrest of a freeholder, 251.
  - suitors, attorneys, counsel, and witnesses, 252.
  - proceedings for relief of party, counsel, &c., wrongfully arrested, 255.
- privilege from arrest founded on the nature of the action.—The Acts of 1836 and 1842, 256.
- arrest, 289.
  - where and by whom made, 290.
  - when it may be made, 290.
  - the manner of making the arrest, 290.
  - how the defendant to be treated afterwards, 291.
  - rescue, 292.
  - escape, 292.
  - of judgment (see Judgment, Arrest of).
  - of judgment, when to be moved for, 589.
  - privilege from, 1164.



- Arrest, continued.**  
 (see Warrant of Arrest.)  
 (see Capias.)
- Assessment of damages by prothonotary, 409.**  
 (see Judgment, Joint.)
- Assignment, 34.**  
 costs on, 729.  
 of errors (see Error.)  
 of judgment (see Judgment, Assignment of).
- Assizes (see Supreme Court, Nisi Prius).**
- Attachment, 470.**  
 against witnesses, 544.  
 execution, 782.
- Attachment-execution.**  
 nature of attachment-execution, 937.  
 where it lies, 938.  
 what may be attached, 939.  
 debts, 940.  
 debts equitably assigned, 942.  
 things pawned, pledged, or demised, 946.  
 legacies and distributive shares, 947.  
 wages and salaries, 649.  
 who may be made garnishee, 950.  
 effect of attachment, 951.  
 relations of garnishee with defendant, 954.  
 sheriff's right to indemnity, 955.  
 effect as to strangers, 955.  
 practice, 956.  
 when the writ may issue, 956.  
 form of the writ, 957.  
 service upon the defendant, 958.  
     garnishee, 959.  
 appearance and default, 959.  
 the interrogatories, 960.  
 answers, 961.  
 pleadings, 964.  
 defences, 966.  
 set-off, 967.  
 trial, 967.  
 evidence, 968.  
 witness, 969.  
 verdict, 969.  
 judgment, 969.  
 appeal, 971.  
 costs, 971.  
 modes of obtaining satisfaction, 972.
- Attachment for witnesses, 555.**  
 sur mortgage, costs, 736.
- Attorneys.**  
 who is an attorney at law, 222.  
 must have certain defined qualifications, 223.  
 admission of attorneys under the Acts of Assembly and under the rules  
     of the courts:—  
     Act of April 14th 1834 provides for admission, 223.  
     judges may admit, 223.  
     oath, 223.  
 power of attorneys relating to suits, 223.  
 warrant of attorney, 223.  
 penalty for misbehavior, 224.  
 penalty for retaining client's money, 224.  
 who shall not practise as attorneys, 224.  
 court may enforce payment of money by attorneys to clients, by attach-  
     ment, 224.

*Attorneys, continued.*

- rules of District Court for admission of attorneys, 224.
- Supreme Court for same, 226.
- punishment of attorneys for official misconduct:—
  - same here as in England, 226.
  - how misconduct is punished, 226.
  - attachment, 226.
  - courts have exclusive control over their officers, 227.
  - attachment no bar to suit, 227.
- duties, privileges, and liabilities of attorneys:—
  - principal duties of an attorney, 228.
  - his obligation to his client, 228.
  - his liabilities for neglect, 228.
  - his liabilities for costs, 229.
  - his privileges, 229.
  - he shall not become special bail, 230.
  - he shall not disclose confidential communications, 230.
  - when he may be examined as a witness, 230.
  - entitled to certain fees, 232.
  - may support an action for services in Pennsylvania, 232.
  - when he has a lien for his services, 232.
  - negligence an answer to action for fees or costs, 232.
  - what constitutes negligence, 233.
  - measure of damages in action against attorney for negligence, 233.
- prosecution and defence of actions by attorney:—
  - his authority, and his warrant, 234.
  - practice as to filing warrant, 234.
  - appearance, 234.
  - filing declaration, 234.
  - effect of his acting without authority, 237.
  - extent of power and authority after a general retainer, 237.
  - attorney's authority in Pennsylvania, less limited than in England, 238.
  - power to bind his client, 238.
  - has no power to compromise or discontinue without special instructions, 238.
  - agreements between attorneys must be in writing, 240.
  - party may countermand authority of attorney, 240.
  - such countermand in Pennsylvania may be made without application to the court, 240-241.
- Audit, costs of, 739.
- Audita querela.*
  - nature of, 1164.
  - advantage of, 1165.
  - in what court it lies, 1166.
  - Beale v. Commonwealth*, 1166.
  - application for, in England, 1166.
  - practice in, English and American, 1166.
  - Stephens v. Stephens*, 1166.
  - cases in which relief will be granted by. Opinion by Lowrie, J., 1167.
  - discussion of the form of the remedy, 1167, 1168.
  - its application in our practice, 1168.
  - Schott v. McFarland*, 1169.
  - writ not obsolete, but granted, 1169, 1170.
  - brief of cases in England and in the United States, 1170.
  - writ of, will be used in Pennsylvania, 1171.
  - practice on moving for and granting, 1171.
  - form of petition for, 1171.
- Auditors, practice before, 1071.
  - appointment of, 1072.
  - powers of, 1073.
  - jurisdiction of, 1074.
  - report of, 1077.
  - compensation of, 1078.

Award and arbitration, costs in (see Appeal, Costs on).

Bail, generally, 292.

the right to hold to, 293.

in certain actions, 294.

double arrests, 295.

rule to show cause of action, and why defendant should not be discharged on common bail, 300.

at what stage of the proceedings this rule may be taken, 301.

how the rule is taken, 301.

affidavits to hold to bail, 302.

form of the affidavit, 303.

substance of the affidavit, 304.

in trespass, assault and battery, &c., 304.

proceedings at the hearing, 306.

try of, 309.

the former practice in relation to bail, 309.

common and special bail, 311.

the practice under the Act of 1836, 312.

perfecting bail, 314.

excepting to bail, 314.

grounds of exception, 314.

time allowed for excepting, 315.

manner of excepting—notice, 315.

waiver of exceptions, 315.

justification, 316.

manner of justification, 316.

effect of justification, 317.

proceedings in case bail become insolvent or remove, 318.

forfeiture and discharge of bail, 318.

forfeiture of, 318.

discharge of, 320.

surrender of, 321.

discharge by arrest of defendant, 324.

matters which operate in excuse of performance, 324.

act of God, 324.

act of the law, 325.

bankruptcy, 325.

insolvency, 325.

act or default of the plaintiff, 327.

cognovit, 327.

stay of execution by agreement, 328.

matters which excuse non-performance, 328.

stay of execution, 328.

mistake of officer, 328.

discharge by principal, 328.

proceedings by plaintiff against the bail, 328.

deposit in lieu of bail, 330.

in error, 685.

execution not to be stayed unless bail entered, 685.

Act of 1836, 685.

condition of the recognisance, 685.

bail not required of executors, &c., 686.

English statutes in force in Pennsylvania, 686.

execution already issued, to be stayed on payment of costs, 686.

appeals from Nisi Prius, security to be absolute, 686.

bail by corporation, 686.

form of recognisance, 686.

by whom to be taken, 687.

two sureties required, 687.

amendment of recognisance, 687.

notice to defendant of entry of bail, and exception to sufficiency, 387.

waiver of oath and recognisance by defendant in error, 687.

liability of bail, 687.

**Bail, continued.**

in United States courts, 178.

recognisance of, on error, 705.

(see *Capias ad Respondendum*.)

Balance found due by defendant, 650.

Bank notes may be taken in execution, 787.

Bar of action, pleas in, 442.

Bill (see Supplemental Bill).

of costs (see Costs).

discovery, 47.

in aid of execution, 1146.

jurisdiction, 1146.

where it lies, 1146.

against whom, 1147.

form, 1147.

scire facias, 1148.

service, 1148.

execution, 1149.

exception, 580.

founded on stat. 13 Ed. 1, 570.

what may be excepted to, 570.

extends only to cases where a party is impleaded, 570.

cases where it does not lie, 570.

must be tendered at the time of the trial, 570.

to evidence when it is offered, 571.

to the charge before verdict, 572.

may be taken at the time and put into form afterwards, 572.

only specific points excepted to to be re-examined, 572.

judges to seal bill, and practice where they refuse, 573.

writ of error upon, 573.

part of the record, 573.

where the judge dies or goes out of office before sealing bill, 573.

rules of court, 573.

time of presenting bill and having it settled, 573.

at Nisi Prius, 11.

(see *Nul Tiel Record*.)

particulars.

when bill may be called for, 422.

if bill is insufficient, further particulars may be demanded, 423.

proceedings stay until demand is answered, 423.

plaintiff bound by the bill delivered, 423.

it should be particular and specific, 424.

when it may be amended, 424.

amendments to bills, 424.

Bonds of indemnity (see Writ of Inquiry).

Books and papers.

production of under the Act of 1798, 544.

notice to produce, 545.

act does not extend to torts or proceedings in rem, 545.

correct practice under the act, 545.

effect of non-production at trial, 545.

order to produce must be founded on special affidavit, 545.

party must have due notice of motion, 545.

affidavit must describe books and papers with reasonable certainty, 545.

order making rule absolute to be in the alternative, 546.

affidavit of one party puts the other on his denial of his custody or control

of books and papers, 546.

upon such denial other evidence must be produced before order will be made, 546.

order under act conclusive only as to pertinency of documents, 546.

proceedings under this act within the discretion of the court, 546.

rule when made absolute is peremptory and the act must govern, 546.

reasons for not making rule absolute should be produced on the hearing of the rule, 547.

**Books and papers, *continued*.**

- the remedies by the act and the common law are concurrent, 547
- non-production of books and papers entitles party to introduce parol evidence, 547.
- if writings are produced the whole must be given in evidence, 547.
- production of documents does not make them evidence for the party producing them, if the opposite party does not use them in evidence, 548.
- documents when produced and used are in evidence for both parties, 548.
- when not necessary to give notice to produce document, 548.
- notice served on party's attorney is sufficient, 548.
- party himself may testify as to contents and service of his own notice, 548.
- when lease in hands of plaintiff will be ordered to be produced, 548.
- papers mutually dependent, produced on call, must both be read or neither, 549.
- rule to produce when absolute is a rule nisi, 549.
- books produced at trial in compliance with the order of the court are in its custody, and it may make such disposition of them as justice shall require, 549.
- its orders in this respect not subject to writ of error, 550.
- when party will be allowed inspection of document under order of court, 550.

**Capias ad respondendum.**

- in what cases the capias may issue, 283.
- the time and manner of issuing the writ; its form, &c., 285.
- service of the writ, 287.
  - in special cases, 287.
  - prisoners, 287.
  - lunatics, 287.
  - where direction is given not to arrest the defendant, 288.
- arrest, 289.
  - where and by whom made, 290.
  - when it may be made, 290.
  - the manner of making the arrest, 290.
  - how the defendant to be treated afterwards, 291.
  - rescue, 292.
  - escape, 292.

**bail, 292.**

- generally, 292.
- the right to hold to bail, 293.
- in certain actions, 294.
- double arrests, 295.
- former discharge under the insolvent laws of another State, 296.
- former discharge under the insolvent laws of this State, 299.
- effect of rule for arbitration, 300.
- rule to show cause of action, and why defendant should not be discharged on common bail, 300.
  - at what stage of the proceedings this rule may be taken, 301.
  - how the rule is taken, 301.
  - affidavits to hold to bail, 302.
  - form of the affidavit, 303.
  - substance of the affidavit, 304.
  - in trespass, assault and battery, &c., 304.
  - proceedings at the hearing, 306.
- entry of bail, 309.
  - the former practice in relation to bail, 309.
  - common and special bail, 311.
  - the practice under the Act of 1836, 312.
  - perfecting bail, 314.
  - excepting to bail, 314.
  - grounds of exception, 314.
  - time allowed for excepting, 315.

**Capias ad respondendum, *continued.***

- manner of excepting—notice, 315.
  - waiver of exceptions, 315.
  - justification, 316.
  - manner of justification, 316.
  - effect of justification, 317.
  - proceedings in case bail become insolvent or remove from the State, 318.
  - forfeiture and discharge of bail, 318.
  - forfeiture, 318.
  - liability of bail, 319.
  - discharge of bail, 320.
  - surrender, 321.
  - time of surrender, 322.
  - enlarging time for surrender, 323.
  - notice of surrender, 323.
  - how bail is relieved after surrender, 324.
  - discharge by arrest of defendant, 324.
  - matters which operate in excuse of performance, 324.
  - act of God, 324.
  - act of the law, 325.
  - bankruptcy, 325.
  - insolvency, 325.
  - other cases, 326.
  - how bail are relieved in such cases, 326.
  - act or default of the plaintiff, 327.
  - cognovit, 327.
  - stay of execution by agreement, 328.
  - other matters which excuse non-performance, 328.
  - stay of execution, 328.
  - mistake of officer, 328.
  - discharge of principal, 328.
  - proceedings by plaintiff against the bail, 328.
  - deposit in lieu of bail, 330.
  - return of the capias, 330.
  - if the officer is unable to find the defendant, 330.
  - when the defendant has been arrested, 331.
  - effect of the return, 331.
  - alias, 331.
  - proceedings where the sheriff is unable to find some of the defendants, 332.
- Capias ad satisfaciendum (see Sheriff; Special Capias).**
- where it lies, 1124.
  - when it issues, 1124.
  - form, 1125.
  - service, 1126.
  - privilege from arrest, 1126.
  - escape, 1127.
  - the sheriff's liability, 1127.
  - return, 1128.
  - proceedings subsequent to the arrest, 1129.
  - satisfaction by payment, 1129.
  - by discharge, 1130.
  - by death of defendant, 1131.
  - discharge under the insolvent laws, 1131.
  - under the Bread Act, 1133.
  - imprisonment, 1134.
  - effect of an arrest on a ca. sa., 1134.
  - costs on, 729.
- Case stated, 587, 588.**
- when may be made, 587.
  - form and object of, 587.
  - requisites of, 587.

- Case stated, *continued*.  
     at what time it may be agreed on, 587.  
     may be rescinded, 587.  
     mode of filing and argument, 588.
- Certificate of judge, costs on, 724.  
     of points of disagreement in United States Courts, 217.
- Certified copies, 542.
- Certiorari, 27, 31, 696, 1116.  
     costs on, 729.  
     from Supreme Court, 676.  
     when it lies, 678.  
     to alderman, 710, 716.  
     nature of the writ, 710.  
     where and for whom it lies, 711.  
     preliminary oath and recognisance, 711.  
     time of issue and service, 712.  
     service and return, 713.  
     diminution of record, 713.  
     assignments of errors, 713.  
     errors for which the judgment will be reversed, 713.  
     hearing, 715.  
     judgment of Common Pleas final, 715.  
     execution, 716.  
     costs, 716.
- Challenge, 561.  
     as to viewers, 538.
- Charge (see Bills of Exemption).
- Charging the jury (see Jury).  
     in general, 568.  
     rules of District Court, 569.  
     rules of Common Pleas, 569.  
     points must be presented in proper time, 569.  
     court not bound to give opinion on facts, 569.  
     but may on the weight of evidence, 569.
- Charities, 58.  
     equity jurisdiction over, 58.
- Charters, 38.
- Chattels pawned may be taken in execution, 787.  
     real (see Execution).
- Choses in action (see Execution).
- Citizens of different States may sue in the United States Courts, 148.
- Claim of exemption (see Exemption).
- Clerk of the United States Courts, 133.  
     (see Officers of the Courts).
- Cognovit, 392.
- Coins may be taken in execution, 787.
- Commission, 557.  
     to examine witnesses, 519-527.  
     manner of obtaining rule for commission, 519.  
     preparing the same, 519.  
     direct and cross interrogatories, 519.  
     new commission may be sent, 520.  
     commission is stay of proceedings, 520.  
     reasonable time for execution and return of commission, 520.  
     commission in cases before magistrates, 521.  
     of the manner of executing the commission, 522.  
     commission irregularly executed cannot be read, 522.  
     commissioners must strictly pursue instructions, 522.  
     manner of swearing witnesses, 522.  
     return to the commission, 522.  
     exceptions to execution of commission, 523.  
     commissions addressed to several commissioners, 523.  
     commissioners and witnesses should be sworn, 524.
- VOL I.—75

*Commission, continued.*

- commission should be filed in office on its return, 524.
- agent or attorney of party should not be present at examination of witnesses, 525.
- interrogatories must be substantially answered, 525.
- cross-interrogatories must be put, 525.
- expenses of commission, 526.
- commissions sub mutue vicissitudinis or letters rogatory, 526.
- letters rogatory by law of nations, 526.
- court will compel attendance of witnesses, 527.
- court executing the commission will not decide points of regularity or irregularity under practice of the court whence the letters come, 527.

*Commissioner, 506.*

- United States, 137.

*Committee of lunatic, costs, 762.**Common law forms, equitable relief under (see Equitable Relief by Common Law Forms).**Common Pleas, Affidavit of Defence Law extended to, 368.*

- power over judgment transferred from another county, 662
- (see Courts; Common Pleas.)

*Commonwealth, exemption from costs, 722.**Compulsory arbitration (see Costs).*

- nonsuit, 579.

*Concurrent jurisdiction (see Equity).**Condemnation (see Execution).**Conditional verdict, 118.**Confusion of goods, 98.**Congress (see Arrest).**Consolidating actions, its purpose, 426.*

- matter of discretion with the court, 426.
- defendant must consent to it, 427.
- consolidation rule, what it is, 427.

*Consolidation of costs in United States courts, 179.**Constitution of 1790, equity powers under, 47.**Contempts, power to punish, 122, 124.**Continuance, outstanding commission, 557.*

- amendments causing surprise, 557.
- other causes, 557.
- conditions may be imposed, 557.
- must be moved for early, 558.
- in District Court cause to be assigned, 558.
- by agreement in Nisi Prius, 558.
- pleas puis darrein, 558-560.
- (see Absence of Party).

*Contract for conveyance of land, 80.*

- for sale of land where vendor dies, 48.

*Contribution, 65, 1145.**Copy, when must be filed under Affidavit of Defence Law, 381.**Coroners (see Officers of the Courts).**Corporations chattels of may be taken in execution, 797.*

- execution against, 1152, 1169.
- private, 1152.
- in case there is property, 1153.
- how executed, 1153.
- proceedings for discovery of effects, 1154.
- where no property can be found; sequestration, 1154.
- where sequestration lies, 1155.
- against what, 1155.
- the form of the writ, 1155.
- the sequestrator, 1155.
- powers and duties, 1155.
- payment of debts, 1156.



- Corporations, execution against, *continued.***  
 · control exercised by the court, 1156.  
 in case of a public work, 1157.  
 object of proceeding, 1157.  
 municipal corporations, mandamus, execution, 1158.  
 where it lies, 1158.  
 against what, 1158.  
 the form, 1159.  
 effect, 1159.
- Costs, 618, 716, 989.**  
 incident to judgment; final; interlocutory; distribution of the general subject, 719.  
 plaintiff's, 720.  
 of the plaintiff's right to costs generally and in particular forms of action, 730.  
 no costs at common law, 720.  
 costs allowed plaintiff in verdict for damages, 720.  
 statute of Gloucester allowing plaintiff's costs, 720.  
 no costs allowed informer unless given by act, 721.  
 costs allowed in action upon statute, 721.  
 reason for the distinction,—after statute of Gloucester jury taxed damages and costs, separately, 721.  
 costs in ejectment, 721.  
 partition, 721.  
 scire facias and actions of waste, 721.  
 the commonwealth neither receives nor pays costs except where directed by act, 722.  
 reason for this, 722.  
 the United States also exempted from costs, 722.  
 this exemption founded on sovereignty applies to the sovereign alone, 722.  
 actions on official bonds, 722.  
 Act of March 1824, 722.  
 June 14th 1836, quo warranto, 723.  
 April 16th 1845, official bonds, 723.  
 costs on mandamus, 723.  
 when plaintiff recovers less than 40 shillings damages, he is entitled to no more costs than damages, 723.  
 statute of Car. II., c. 9, 723.  
 40 shillings equal to \$5.33, 724.  
 certificate of judge, 724.  
 costs may be recovered on writ of inquiry, 724.  
 cases to which the statute does not extend, 724.  
 when certificate of judge not necessary to entitle plaintiff to costs, 724.  
 statute 8 & 9 Wm. III., c. 2, 726.  
 Act of March 27th 1713, 725.  
 exceptions to this statute, 725.  
 Act of March 21st 1806, when costs shall not be recovered under it, 726.  
 costs de incremento, 726.  
 when defendant is entitled to general costs of cause on several issues, 727.  
 costs in divorce, 728.  
 no costs in foreign attachment at common law, 728.  
 costs allowed in Pennsylvania, 728.  
 of feigned issue in Register's Court, 728.  
 of feigned issue in Common Pleas, 729.  
 on certiorari, 729.  
 on mandamus, 729.  
 in cases of lunacy, 729.  
 on writ of *capias*, 729.  
 on arrest of exempt freeholder, 729.  
 assignee's costs on voluntary assignment, 729.

*Costs, continued.*

- plaintiff's right to costs in actions within jurisdiction of justice of the peace; and where he recovers a sum less than that required by law to give the court jurisdiction, 730.
  - general rule, 730.
  - reduction by set-off or cross-demand, 730.
  - when affidavit need not be filed, 730.
  - when costs in one suit only can be recovered, 731.
  - distinction where amount is reduced by direct payment and set-off, 731.
  - Act of 1810, § 26, 731.
  - 1814, § 1, 6, 731.
  - February 13th 1816, 731.
  - cases of rent and ground-rent, under Act of 1810, 631.
  - Act of April 8th 1840, 732.
  - jurisdiction of the District Court of the city of Philadelphia, 732.
  - jurisdiction of the Supreme Court in city of Philadelphia, 733.
  - what is "matter in controversy," 733.
- defendant's costs, 734.
  - defendant's costs generally, 734.
  - statutes of Gloucester, 734.
  - statute of Elizabeth, 734.
  - statute of 8 & 9 Wm. III., c. 11, 734, 735.
  - Act of April 3d 1779; replevin, 735.
  - actions of scire facias, 735.
  - defalcation; Act of 1705, 736.
  - garnishee's right to costs in foreign attachment, 736.
  - attachment sur mortgage, 736.
  - garnishee's right to his expenses and counsel fees, 737.
  - where there are several defendants and one or more are acquitted by verdict, 737.
  - acquittal of one of several in trespass, assault, false imprisonment, and ejectment, 737, 738.
  - judgment by default, 738.
  - plea pleaded when found for defendant he is entitled to costs, 738.
  - the statute does not extend to replevin, trespass on the case for tort or trover, nor to action of scire facias, 738.
  - in case of an equitable plaintiff, 738.
  - Act of April 23d 1829, makes equitable plaintiff liable for costs, 738.
  - party for whose action is brought is liable for costs, 739.
  - in case of establishing a will costs must be borne by those having a direct interest in the result, 739.
  - what costs are included, 739.
  - costs on audit under exceptions to sheriff's return must be paid by party excepting, if he fails, 739.
  - costs in lunacy, 740.
  - rule in England is that estate of lunatic must pay costs if lunacy is established, 740.
  - in Pennsylvania courts have control of the costs under our acts, 740.
  - security for costs, 740.
  - rule of court, District Court, 740.
  - practice under the rule, 740.
  - practice in Common Pleas and Supreme Court, 741.
  - when security will be required, 741.
  - residence of plaintiffs, 741.
  - residence of defendants, 741.
  - demand for security must be made within a reasonable time, 741.
  - must be after bail in bailable actions, 741.
  - case of infancy, 742.
  - costs of former actions, 742.
  - court will stay proceedings until all costs in former actions are paid, 742.
  - both actions must be for the same cause, 742.
  - proceedings in ejectment, 743.

*Costs, defendant's, continued.*

- application for stay must be made to court in banc, 743.
- refusal of court to stay is not ground for writ of error, 743.
- Act of April 11th 1825, and August 2d 1847, 743.
- defendant's costs after tender and payment of money into court, 743.
  - Act of 1705, § 2, 743.
  - tender previous to institution of suit; payment into court, 743.
  - payment must be made under a rule, 743.
  - payment into court after suit brought, must be with costs up to time of payment, 744.
  - where plaintiff becomes nonsuited, defendant is entitled to costs, 744.
  - after payment into court defendant cannot take it out, 744.
  - rule in the Common Pleas, 744.
- by and against particular persons, 759-762.
- in actions by and against executors and administrators, 759.
  - when liable de bonis propriis, 760.
  - exempt from costs on appeal, 760.
- committee of lunatic is *prima facie* liable for costs, 762.
- infant defendant liable for costs, 762.
- infant plaintiff, if he fails, defendant is entitled to costs, and may have attachment to enforce them against guardian or next friend, 762.
- when guardian may appeal, 762.
- costs double and treble, 763.
  - generally party is entitled to single costs only, 763.
  - when party is entitled to double costs, and what are double costs, 763.
- double costs in England and in Pennsylvania differ, 763.
- double costs in Pennsylvania, 763.
- in arrest of judgment, 619.
  - equity, 101.
  - error, 705.
  - United States courts, 191.
- of audit, 1078.
- on appeal from aldermen and justices of the peace, 746-751.
  - Act of March 20th 1810, 746.
    - 1845, 746.
  - appeal from judgment against plaintiff, 746.
  - when costs may be recovered on this appeal, 746.
  - costs on award and arbitration, 746.
  - costs on affirmance of justices, 747.
  - judgment where same evidence before both tribunals, 748.
  - the effect of the production of new evidence in Common Pleas, 748.
  - costs on appeals now regulated by Act of April 9th 1833, 748.
  - sections of the act and cases under them, 748.
  - general principle is that costs being creatures of the statute, defendant must pay them on final judgment, unless he brings himself within the exceptions, 749.
  - what constitutes a sufficient tender to exempt defendant from costs under statute of 1833, 750.
  - trespass and trover are within the Act, 751.
  - Act of March 20th 1845, its effect upon awards of arbitrators—its effect upon judgments of aldermen and justices of the peace, 751.
- on demurrer, 494.
  - judgment of non pros., 530.
- taxation of costs, what it is, 764.
- plaintiff's or defendant's bill must be filed in the office, 764.
- if objected to must be taxed by prothonotary under rule of court, 764.
- rule in the Common Pleas and District Court, 764.
- the fee-bill of February 22d 1821, 765.
- Act of March 21st 1806, § 5, 766.
  - 1814, § 26, 27, 766.
  - April 11th 1825, 766.
  - May 6th 1844, § 8, 767.
- attendance of witnesses must be proved if disputed, 767.

**Costs, taxation of, *continued*.**

- fees of witnesses taxable, 767.
- per diem and mileage allowance, 768.
- costs abide event when cause is a remanet, 768.
- party dissatisfied with prothonotary's taxation of costs may appeal to court, 769.
- method of enforcing payment of costs, 769.
- order for payment of costs may be enforced by attachment, 769.
- rules for payment of costs on judgments must be granted on motion in open court, 770.
- set-off in case of costs, 770.
- plaintiff is eventually liable to officers of court for fees prescribed by law, and they are frequently paid at the time the services are rendered, 771.
- prothonotary may maintain suit for his fees, 771.
- (see Attachment Execution).

**Counsel, absence or engagement of.**

- rules of the District Court, 553.
- engagement in another court, 553.
- where more than one counsel are concerned, 554.
- what is an engagement within the rule, 554.
- rules of the Nisi Prius, 554.
- sickness or public duty, 554.
- where more than one counsel concerned, 554.
- rules of the Common Pleas, 554.
- more than one counsel concerned, 554.
- notice of engagement, 555.

**fees, costs, 737.****summing up by, 568.**

- rules of court, 568.
- in District Court and Common Pleas only one counsel on each side allowed to sum up, 568.
- order of addressing the jury, 568.
- in Nisi Prius number of counsel not limited, 568.
- party maintaining the affirmative of the issue begins and concludes, 568.
- attorney may be a witness, but the court may forbid his addressing the jury, 568.

**Court of Common Pleas (see Courts, Common Pleas).**

- Courts** constitutional and statutory provisions for, 2.
- United States, constitutional provisions, 130.
- District Court of the United States, 133.
  - organization, 133.
  - clerk, 135.
  - marshal, 135.
  - commissioners, 137.
  - attorneys, 137.
  - jurisdiction at common law, 138.
  - exclusive, in all seizures on land or waters not navigable, and under laws of the United States, 141.
  - original, for penalties and forfeitures under the laws of the United States, 141.
  - concurrent, in suits by aliens for torts, &c., 141.
  - concurrent, in suits by United States, or an officer under an Act of Congress, 141.
  - exclusive of state courts in suits against consuls, 141.
  - concurrent with Circuit, by assignee of debentures, 141.
  - proceedings for the repeal of letters patent, 141.
  - writs of injunction, 142.
  - warrants of distress against delinquent public officers, 142.
  - Steamboat and Passenger Act, 142.
  - scire facias and habeas corpus, 142.
  - admiralty, 143.

*Courts, continued.*

Circuit Court of the United States, 143.

organization, 143.

jurisdiction, 145.

original jurisdiction under the Act of 1789, 146.

amount required—how determined, 146.

alienage of parties, 147.

citizens of different states; corporations; formal parties; jurisdiction once vested cannot be divested by change of domicile; averment of citizenship in pleadings; averment to be taken as *prima facie* true, 148.

defendant must be an inhabitant of district where sued. Where several defendants, court has jurisdiction of parties properly before it, 152.

assignees of choses in action cannot sue unless a suit could have been brought, if no assignment had been made, 153.

patent rights; exclusive of state courts, 155.

slave-trade; passenger-ships; post-office; collection laws; revenue laws, 157.

jurisdiction by removal from state courts, 158.

suits against aliens, or by citizen of the state where suit is brought against the citizen of another state; amount to exceed \$500. Suits between citizens of the same state, where the title to land under a grant from another state. Actions civil or criminal against persons acting under the authority of the President or an Act of Congress, during the rebellion. Formal parties do not take away right, 159-164.

jurisdiction by removal from the District Court, 164.

appellate jurisdiction, by writ of error to the District Court and to the state court in suits for taxes, duties, &c., 166.

courts of the United States governed by the laws of the state where the laws of the United States are inapplicable, 168.

does not extend to process and practice, 168.

effect given to Statute of Limitations, 169.

take judicial cognisance of the laws of the several states, 169.

adopt construction of the state courts, 169.

local and transitory actions, 169.

process, 170.

imprisonment for debt, 174.

liens for judgments co-extensive with district, 174.

limit as to time governed by state law, 175.

interest on judgments, 175.

garnishee process, 176.

practice, 177.

appearance and bail, 178.

consolidation of suits, 179.

evidence, 179.

depositions, 181.

copies, 184.

production of books, 185.

pleadings, 187.

death of parties, 187.

amendments, 189.

judgment, 191.

assessment on bonds, 191.

costs, 191.

jails and discharge from imprisonment, 193.

Supreme Court of the United States, 197.

organization, 197.

to consist of a chief justice and nine associate justices, 197.

provisions of 1802 repealed, 157.

jurisdiction, 198.

original jurisdiction, 198.

*Courts, continued.*

- exclusive in all controversies to which a state is a party, 198.
- except between a state and its citizens, 198.
- original, but not exclusive, between a state and citizens of other states, or aliens, 199.
- exclusive, in proceedings against ambassadors, 200.
- mandamus to officers of United States, 200.
- appellate jurisdiction, 200.
  - limited by Acts of Congress, 200.
  - depends upon the character of suit, 200.
  - error to Circuit Court, 201.
  - final judgments and decrees in, 201.
  - amount in controversy must exceed \$2000, exclusive of costs, except in case of copyrights and patents, 201.
  - and in suits for the enforcement of the revenue laws, 203.
  - to be brought within five years, 203.
  - amount in controversy in ejectment, 204.
  - replevin suits for specific chattels, 204.
  - judgment must be final, 206.
  - writs of error, 206.
  - security to be taken, 207.
  - to act as a supersedeas, 207.
  - service of citation, 207.
  - costs, 211.
  - interest, 211.
  - special verdict, 211.
  - case stated, 211.
- error to the highest state court, 212.
- final judgments and decrees, 212.
- when the subject of a writ of error or appeal, 213.
- judgment must be final, 214.
- jurisdiction must appear on the record, 215.
- certificate of points of disagreement from the court, 217.
- writ of prohibition—mandamus—habeas corpus, 219.
- organization of the Supreme Court of Pennsylvania, 3.
  - division of the State into districts, 3.
  - duty of judges to hold four terms annually, 4.
  - special return day in July in Eastern District, 4.
  - the amendment of 1850 providing for the election of the judges, 4.
  - note—names of judges elected, 5.
  - Acts of 1851 and 1852, 5.
- past history of Supreme Court.
  - the establishment of the court in 1722, 6.
  - its jurisdiction, 6.
  - appeal to king reserved, 6.
  - organization of court after Federal Union formed, 6.
  - Court of Nisi Prius or Assizes, 7.
  - Acts of 1806 and 1809, 7.
- present jurisdiction of the Supreme Court.
  - its general jurisdiction, 8.
  - jurisdiction in Philadelphia county, 8.
  - its duty to make rules and frame writs, 9.
  - duty to give notices of rules and forms, 9.
  - its jurisdiction, how abridged, 9.
  - its power over in prior jurisdictions, 9.
  - to remit its decrees to inferior jurisdictions, 9.
- Supreme Court Nisi Prius, organization of under Act of 1834, 10.
  - to hold Nisi Prius in Philadelphia at least once a year, 10.
  - may enter judgment, 10.
- jurisdiction of Nisi Prius under Act of 1842, 10.
  - its jurisdiction \$500; how determined in tort, 10.
  - terms fixed; power to issue process, 11.
  - bill of exceptions may be taken, 11.

*Courts, continued.*

mode of taking appeal or writ of error, 12.

its equity powers and jurisdiction, 12.

fee-bill in equity, 12.

District Court for the city and county of Philadelphia, 15.

its common law jurisdiction, 15.

the origin of this tribunal in 1811, 15.

limitation of its existence and its continuance by Acts of Assembly, 15.

required to hold four terms annually, 15.

mode of selecting and summoning jurors, 15.

criterion for determining its jurisdiction, 16-18.

its jurisdiction in mechanics' liens, 20.

in the removal of nuisances, and to recover a penalty for marrying a minor, 21.

interpleader, 22.

to perpetuate testimony as to lost records, 22.

its equity jurisdiction, 22.

by Act of May 8th 1854, P. L. 679, § 1, concurrent equity jurisdiction with the Court of Common Pleas is conferred, 22.

Court of Common Pleas for the city and county of Philadelphia, 22.

its common law jurisdiction, 22.

originally both civil and criminal, 22.

its organization under the Act of April 14th 1834, 23.

special provisions enabling president judge of one district to sit in another, 23.

jurisdiction—1. Appellate; 2. Original, 24.

jurisdiction in original suits now limited to \$500, 25.

mode of ascertaining the jurisdiction, 25.

exceptions, 25.

certiorari, 27.

appeals from magistrates' judgments, 28, 29.

trial of appeal is trial de novo, 29.

practice in appeals, 29, 30, 31.

equity jurisdiction, 32.

by constitutional provision, 32.

by Act of June 16th 1836, 32.

special enlargement of jurisdiction for the Common Pleas of Philadelphia county, 32.

by Acts of 1840 and 1845 jurisdiction extended to fraud, accident, mistake, or account, 32.

by Act of 1840 jurisdiction extended to account render, 32.

by Act of 1845 to dower and partition, 33.

by Act of 1848 to discovery of facts, 33.

by Act of 1857 chancery jurisdiction of Philadelphia Common Pleas extended to all Courts of Common Pleas, 33.

jurisdiction in case of disputed boundaries, 33.

mode of serving process on parties out of jurisdiction, 33.

Powers common to courts.

they have power to enforce fines, 122.

to establish rules of practice, 122.

to issue writs of subpoena, 122.

to punish official misconduct of officers, 122.

to punish disobedience or neglect of officers, parties, jurors, or witnesses, 122.

to punish contempts, 122.

statutory regulations on the subject, 122, 123, 124.

Covenants performed, 459.

Criers (see Officers of the Court).

Criminal cases, error in, 710.

Crops (see Execution).

Cross-examination, 509.

Damages, general observations, 584.

on several counts, 585.

**Damages, continued.**

where there are several issues, 585.  
 measure of, 586.  
 omission to assess, 586.  
 double damages, 587.  
 assessed conditionally, 644.  
 measure of (see Execution).  
 unsuitable, 614.  
 (see Writ of Inquiry.)

**Death of defendant in execution, 828.**

one defendant before judgment, 640.  
 party between verdict and judgment, 639.  
 party when scire facias must issue (see Writ of Inquiry).  
 plaintiff in execution, 828.  
 (see Execution.)

**Decedent (see Judgment against Deceased Persons).****Declaration, plaintiff must file, 354.**

general requisites of, 354.  
 must state good cause of action, 355.  
 may be filed after judgment, 355.  
 if two narrs. filed, plaintiff must elect, 356.  
 under Act of 1806, 354.

**Defalcation, 463.****Default of one of two defendants, 644.****Defence (see Affidavit of Defence).****De injuria, replication in, 486.****Demurrer—what a demurrer is, 488.**

defective count or plea only should be demurred to, 488.  
 general, 488.  
 special, 489.  
 matter of form must be specially demurred to, 489.  
 generally safer to demur specially, 489.  
 effect of demurrer, 489.  
 court will consider whole record, 490.  
 must be filed, 490.  
 and joinder make issue in law, 490.  
 where several issues, some of law and some of fact, advisable to  
   have demurrer first determined, 491.  
 discretionary with the court which to determine first, 491.  
 judgment on, 492.  
 amendment after, 492.  
 judgment on, entitles to costs, 493.  
 after judgment on, no arrest of judgment, 621.  
 in equity, 102.  
 to evidence, where it is proper, 575.  
   effect of, 575.  
   must admit truth of all facts a jury might find, 576.  
   party offering evidence must join in demurrer or waive  
     the evidence, 576.  
   judge to determine the facts to be admitted, 577.  
   damages may be assessed conditionally, 577.  
   judgment on such demurrer, 577.  
   subject to writ of error or arrest, 577.

**Depositions.****rule to take, 500.**

examination de bene esse, 501.  
 deposition of ancient, infirm, and going witnesses, 501.  
 rules of the Supreme Court, 501.  
 rules of the District Court, 501.  
 depositions taken may be read in Circuit Court, 502.  
 and on appeals to Supreme Court, 502.  
 order in nature of subpoena to compel attendance of witnesses, 503.  
 notice of taking depositions, 503.  
 service of notice on attorney, when good, 503.



*Depositions, continued.*

- service of notice generally, 503.
- written interrogatories, 504.
- notice to take depositions on consecutive days, when good, 504.
- what the notice should contain, 505.
- what is convenient certainty, 505.
- what defects of notice will be cured by appearance or taking depositions without objection, 506.
- before whom and in what manner depositions are to be taken, 506.
- examiners and commissioners, 506.
- interlineations, 507.
- justice of the peace, 507.
- depositions *ex parte*, 508.
- depositions ought to be reduced to writing by officer of the law, 508.
- may be in handwriting of counsel by consent, 508.
- power of adjournment, 509.
- proper practice when depositions are taken on interrogatories, 509.
- swearing witness, 509.
- examination and cross-examination, 509.
- exhibits; course to be taken when witness refuses to testify, 509.
- when former depositions may be read, 509.
- interrogatories, if any should be attached to return, 512.
- witness must sign deposition, 512.
- magistrate should add jurat, 512.
- when a deposition regularly taken may be read, 512.
- must be promptly filed, 512.
- exceptions must be promptly taken, 512.
- when adverse party may use testimony, 513.
- when deposition may not be read, 513.
- when it may be read, 514.
- rule as to taking out subpoena, 514.
- effect of clause "subject to all legal exceptions," 514.
- deposition cannot be read if witness can attend, 514.
- second deposition of same witness may be taken, 515.
- deposition is only secondary evidence, 516.
- Act of March 28th 1814, 517.
- depositions in ejectment, 518.
- exceptions to, 512.
- must be filed, 512.
- on hearing of motion, 1161.
- Dilatory pleas (see Pleas).
- Diminution of record (see Record, Diminution of).
- Discharge, 1131-1133.
- from imprisonment in the United States courts, 193.
- Discontinuance—when plaintiff may discontinue, 475.
- he must pay costs, 476.
- regularly no discontinuance without leave of court, 476.
- no discontinuance after set-off pleaded, 476.
- no discontinuance after *bonâ fide* assignment of debt, 476.
- general verdict or writ of inquiry, 476.
- allowed which tends to oppress the defendant, 477.
- right to discontinue considered in opinion of Smith, J., 477.
- no discontinuance allowed by one of several plaintiffs in an ejectment, 479.
- after interlocutory judgment, 479.
- opinion per Stroud, J. (note), 479.
- allowed upon special application to court, 480.
- no bar to action, 480.
- by agreement, 480.
- Discovery, 33, 53, 59, 75.
- when bill for discovery will lie, 90.
- bill for discovery in aid of execution, 90.

*Discovery, continued.*

- mere fishing bills will not be sustained, 91.
- when court will not compel defendant to answer, 91.
- party is entitled to discovery of all that is material, 91.
- pleading and practice in discovery, 91.
- under the Act of 1836, 91.
- what the bill must set forth, 91.
- when defendant is bound to answer, 92.
- what the defendant may be required to answer, 92.
- motion to strike off bill, 92.
- demurrer to bill, 92.
- service of the subpoena, 95.
- interrogatories, 96.
- bill must aver that judicial proceedings are commenced or contemplated, 97.

*Discretion, matters of, 680.*

- writ of error does not lie for matters of discretion in the court below, 680.
- what are matters of discretion, 680.

*Disobedience, power to punish, 122.**Disputed boundaries, 33.**Distribution by court, 1037.*

- by sheriff, 922, 1034.

(see Execution.)

*District Court (see Courts).**Distringas (see Execution).**Divorce, 35.*

- costs in, 728.

*Docket, entry of judgment on, 624.**Double and treble costs, 763.*

- generally party is entitled to single costs only, 763.
- when party is entitled to double costs, and what are double costs, 763.
- double costs in England and in Pennsylvania differ, 763.
- double costs in Pennsylvania, 763.

*Double pleas—at common law defendant could plead one plea, 469.*

- statute of 4 Ann. chap. 16, 469.
- several matters may be pleaded to plea in bar, 470.
- this not allowed in dilatory pleas, 470.

*Dower, 33.**Ejectment, costs in, 721.*

- depositions in, 518.

*Election, 36, 75.*

- the doctrine as to equitable assets in case of volunteer, 97.
- English rule of doubtful authority in Pennsylvania, 97.
- Act of 1856, 97.
- acceptance under will, 98.

*Elizabeth, Statute of, costs, 734.**Encumbrances, effect of sheriff's sale on, 1037.*

- on judgments, 1039.
- on purchase-money, 1040.
- on ground-rent, 1040.
- on sheriff's recognisance, 1040.
- on debts of decedent, 1041.
- on legacies, 1041.
- on municipal claims, 1041.
- on taxes, 1042.
- on mortgages, 1043.
- what prior liens will operate to discharge a mortgage, 1045.

*Engagement of counsel, 553-555.**Entering judgment (see Judgment, Entering of).*

**Equitable estate, 120.**

judgment, 120.

plaintiff, costs in case of.

Act of April 23d 1829, makes equitable plaintiff liable for costs, 738.

party for whose use action is brought is liable for costs, 739.

in case of establishing a will, costs must be borne by those having a direct interest in the result, 739.

what costs are included, 739.

costs on audit under exceptions to sheriff's return must be paid by party excepting, if he fails, 739.

costs in lunacy, 740.

rule in England is that estate of lunatic must pay costs if lunacy is established, 740.

in Pennsylvania courts have control of the costs under our acts, 740.

pleas (see Equity).

relief, depending on decisions of the Supreme Court (see Equity).

by common-law forms, 75, 102.

assumpsit, or debt, 103.

covenant—specific performance, 105.

replevin, 105.

ejectment, 106.

partition—lost bond—joint demand, 106.

defendant may give evidence of equitable matters under the general issue, 107.

the principle and practice stated, 107, 108.

of general pleas to a personal demand, 108.

payment, 108.

want of consideration, 109.

fraud, 109.

mistake and accident, 110.

notice of equitable matter, 110.

character of the notice, 110.

payment with leave, non solvit, 110.

non assumpsit, 112.

extent of this plea, 112.

its effect—its use, 112.

notice of special matters under it, 113.

set-offs, 113.

set-off under the Statute of Defalcations, 113.

the Defalcation Act gives chancery powers to common law courts, 113.

equitable set-offs not statutable, 114.

set-off in the nature of a counter demand, 114.

meaning of "bargain" in this statute, 114.

torts, 115.

performance, 115.

its former use and restrictions, 115.

importance of this plea in Pennsylvania, 115.

its certainty and utility, 115.

of the general plea where the claim is to the realty, 115.

method of trying title in Pennsylvania, 116.

equitable title, 116.

plea "not guilty," by statute, 116.

equitable rights, 116.

of special equitable pleas, 116.

defendant in personal actions may state his equity specially by plea, 116.

its advantages, 117.

character of plea, 117.

equitable replications, rejoinders, 117.

• conditional verdicts, 118.

*Equitable relief, continued.*

- use and value of such verdicts, 119.
- duty of jury, 119.
- duty of court, 119.
- cautionary verdicts, 119.
- conditional verdicts as a part of the equity system, 120.
- equitable judgments and executions, 120.
- equitable lien of judgments, 120.
- equitable estate bound by judgment in Pennsylvania, 120.
- what the nature of the interest must be to become bound, 121.
- motions for new trials; to open judgment, and for other purposes, founded on equitable circumstance, 121.

replication, 117.

set-off, 117.

title, 116.

*Equity—constitutional provisions, 44.*

- in 1693 county courts had equity jurisdiction, 44.
- in 1710 a Court of Equity established, 44.
- equity jurisdiction has always been exercised by the Orphans' Court, 46.
- provision for powers of Court of Chancery under the Constitution of 1790, 47.
- equity powers relating to lost deeds, conferred in 1786, 47.
- by the Constitution the Supreme Court has jurisdiction, 48.
- in the perpetuation of testimony, 48.
- in obtaining evidence without the state, 48.
- in the case of non compotes mentis, 48.
- in such cases as relief may be necessary in specific performance; in trust, 48.
- specific performance of contracts, 48.
- Act of March 31st 1792, contracts to sell land, 48.
  - extended to committee of lunatic, 49.
  - trustees, 49.
  - assignees, 49.
- special Acts of Assembly giving the courts power to grant relief in particular cases, of interrogatories in the nature of a bill of discovery; stock in corporations; power of auditors in case of assignees' accounts; against corporations on return of nulla bona to execution; the case of the Marietta Trading Company; divorce and habitual drunkards, 50.
- powers to grant relief in equity conferred by Act of 1836, 50.
- Act of 1836 and commissioners' report thereon, 50, 51.
- jurisdiction of the Supreme Court and the Common Pleas, 52.
- perpetuation of testimony, 52.
- obtaining evidence from without the state, 52.
- the case of non compotes mentis, 52.
- jurisdiction over trustees and their accounts, 52.
- control over private corporations, unincorporated associations, and partnerships, 52.
- the care of trust-money and trust-property, 52, 53.
- discovery, 53.
- interpleader, 53.
- injunction, 53.
- specific relief, 53.
- removal of trustees for misconduct and other causes which render them unfit to execute the trust, 54.
- the discharge of trustees at their own request, 55.
- the appointment of new trustees in all cases of vacancy or inability, whether by death, removal, or otherwise, 55.
- relief in the cases of infant, idiot, insolvent, or absent trustees, by directing conveyances, 55.
- compelling conveyance of the legal estate to the cestui que trust when the trust has expired, 55.
- mortgages, 55.

*Equity, continued.*

- equitable rights of married women, 55.
- idiots and lunatics, 57.
- infants, 57.
- charities, 58.
- the power of taking charge of property, both real and personal, for the benefit of parties interested therein, wherever this is necessary for the due administration of justice, 58.
- discovery of facts material at law from parties, 59.
  - from persons not parties, 59.
- compelling the suppression of facts and circumstances not affecting the merits of the question at law, 60.
- peculiar means of administering distributive justice, 60.
- by reference to masters, 60.
- trial and issues in courts of law, 60.
- special relief in particular cases, by commissions to ascertain boundaries; commissions to make partition; commissions to set out dower, 61.
- peculiar means of administering preventive justice, in case of nuisances; in case of trespass; in case of waste; to restrain proceedings at law, 61.
- preventive justice by means of *quia timet*, 62.
- means of administering justice by decrees, in case of accident, as losing deeds, bonds, &c.; in case of mistake; in case of fraud; in cases where remedies by law are inadequate; by compelling the specific performance of agreements; by enforcing delivery of specific chattels; by relieving against forfeitures and penalties; by rescinding agreements where there was no consideration; by preventing abuses of the rules of law, 62-64.
- in cases of account, 64.
- contribution, 65.
- partnerships, 65.
- jurisdiction and general principles, 75.
- account, 75.
- specific performance, 75.
- injunction, when grantable; practice, 75.
- discovery, when grantable; pleading and practice, 75.
- election, 75.
- fraud, 75.
- perpetuating testimony, 75.
- pleading and practice generally, 75.
- general principles, 75.
- equitable relief by common law forms, 75.
- when jurisdiction over assumed, it will dispose of every subject embraced in the contest, 76.
- equity will not interfere where there is ignorance or mistake of law, 77.
- bills for specific performance, when they may be sustained, 77.
- account—where legal remedy is inadequate, 78.
  - between partners, 78.
  - interpleader, 78.
  - jurisdiction to enforce agents' contracts against principal, 78, 79.
  - to set aside voluntary deed, 79.
  - specific lien, 79.
- specific performance—ordinary powers of chancellor, 79.
  - will not enforce unconscionable bargain, 79.
  - will compel performance by trustee, 80.
    - the vendor to make good misrepresentation, 80.
  - return of objects of curiosity when there is no redress by law, 80.
  - will decree return of article detained in violation of trust, 80.

*Equity, continued.*

- specific performance—will not compel vendee to receive a doubtful title, 80.
  - will compel performance of contract for conveyance of lands, 80.
  - will not compel vendee to take a bad title, 80.
  - will order an issue to determine matters of fact, 81.
  - executed contracts, 81.
  - executory contracts, 82, 83.
  - voluntary contracts inter vivos, 84.
  - equity will not enforce a gaming contract, 84.
  - parties must be diligent, 85.
- injunction, when grantable, 85.
  - when not grantable, 88.
  - practice in granting, 88.
    - on dissolving, 88-
    - on hearing, 89.
  - answers and affidavits, 89.
  - when preliminary injunction will be awarded, 89.
  - security must be given except by commonwealth or municipalities, 89.
- discovery—when bill for, will lie, 90.
  - bill for, in aid of execution, 90.
  - mere fishing bills will not be sustained, 91.
  - when court will not compel defendant to answer, 91.
  - party is entitled to discovery of all that is material, 91.
  - pleading and practice in, 91.
  - under the Act of 1836, 91.
  - what the bill must set forth, 91.
  - when defendant is bound to answer, 92.
  - what the defendant may be required to answer, 92.
  - motion to strike off bill, 92.
  - demurrer to bill, 92.
  - service of the subpoena, 95.
  - interrogatories, 96.
  - bill must aver that judicial proceedings are commenced or contemplated, 97.
- election—the doctrine as to equitable assets in case of volunteer, 97.
  - English rule of doubtful authority in Pennsylvania, 97.
  - Act of 1856, 97.
  - acceptance under will, 98.
- fraud—when equity will release from, 98.
  - must be charged in bill, 98.
  - money obtained *malâ fide*, 98.
  - confusion of goods, 98.
  - inadequacy of price, 99.
  - improvidence, surprise, hardship, 99.
- English rule in force in Pennsylvania as to perpetuating testimony, 99.
- practice where one party dies, 99.
- rule to answer when ordered, 99.
- answer, 99.
  - when defendant not bound to answer, 99.
- chancellor will make no decree when bill and answer stand oath against oath, 100.
- when answer is admitted to be true, 100.
- effect of setting down cause for hearing, 100.
- amendment, 100.
- supplemental bill, 100.
- costs within the control of this court, 101.
- prayer of the bill, 101.
- injunction and receiver in case of partnerships, 102.
- demurrer if too general will be overruled, 102.

*Equity, continued.*

- equity always exercised in Pennsylvania through common law forms, 102.
- assumpsit, or debt, 103.
- covenant—specific performance, 105.
- replevin, 105.
- ejectment, 106.
- partition—lost bond—joint demand, 106.
- defendant may give evidence of equitable matters under the general issue, 107.
- the principle and practice stated, 107, 108.
- of general pleas to a personal demand, 108.
- payment, 108.
- want of consideration, 109.
- fraud, 109.
- mistake and accident, 110.
- notice of equitable matter, 110.
- character of the notice, 110.
- payment with leave, non solvit, 110.
- non assumpsit, 112.
- extent of this plea, 112.
- its effect—its use, 112.
- notice of special matters under it, 113.
- set-offs, 113.
- set-offs under the Statute of Defalcations, 113.
- the Defalcation Act gives chancery powers to common law courts, 113.
- equitable set-offs not statutable, 114.
- set-off in the nature of a counter demand, 114.
- meaning of "bargain" in this statute, 114.
- torts, 115.
- performance, 115.
- its former use and restrictions, 115.
- importance of this plea in Pennsylvania, 115.
- its certainty and utility, 115.
- of the general plea where the claim is to the realty, 115.
- method of trying title in Pennsylvania, 116.
- equitable title, 116.
- plea "not guilty," by statute, 116.
- equitable rights, 116.
- of special equitable pleas, 116.
- defendant may state his equity specially by plea, 116.
- its advantages, 117.
- character of plea, 117.
- equitable replications, rejoinders, 117.
- conditional verdicts, 118.
- use and value of such verdicts, 119.
- duty of jury, 119.
- duty of court, 119.
- cautionary verdicts, 119.
- conditional verdicts as a part of the equity system, 120.
- equitable judgments and executions, 120.
- equitable lien of judgments, 120.
- equitable estate bound by judgment in Pennsylvania, 120.
- what the nature of the interest must be to become bound, 121.
- motions for new trials; to open judgments, and for other purposes, founded on equitable circumstances, 121.
- adjudications (see Equity).
- constitutional provisions as to equity jurisdiction, 32.
- jurisdiction, 32-33.
- jurisdiction of District Court, 22.
- legislation (see Acts of Assembly).
- pleading, 75.
- powers and jurisdiction of Nisi Prius, 12.

- Error, abatement of writ, 691.  
     where the writ abates, 691.  
     argument and paper-books on, 697-698.  
     argument-list and calling of the cases, 697.  
     short causes, 698.  
     paper-books, 698.  
     assignment of, 693-696.  
     time of assigning errors, 693.  
     if several plaintiffs in error, they should join in the assignment, 693.  
     errors not specifically assigned, not noticed, 693.  
     assignment may be amended by leave, 693.  
     different kinds of errors assignable, 693.  
     errors in fact, 694.  
     errors in law, 694.  
     what errors are not ground for reversal, 694.  
     defect must be substantial, 694.  
     must not have been waived, 694.  
     must be injurious, 695.  
     must be reviewable, 695.  
     must appear on the record, 695.  
     assignment in cases of appeal, 695.  
     appeals from the Orphans' Court, 696.  
     certiorari, 696.  
     coram vobis, 709.  
     costs in, 705.  
     costs in writ of, 744-745.  
     no costs were recoverable on a writ of error by Statute of Gloucester, 744.  
     costs under 8 & 9 Wm. III., c. 11, s. 10, given on affirmance of judgment, 745.  
     Supreme Court may impose terms as to costs, 745.  
     where no terms are imposed, costs abide the final event of the suit, 745.  
     judgment on, 701-703.  
     of affirmance and of barring the writ, 701.  
     reversal and recall, 701.  
     reversal in part and affirmance as to residue, 701.  
     two judgments on the same matter, 702.  
     power of Supreme Court to modify judgments, 702.  
     procedendo, 702.  
     venire de novo, 703.  
     in criminal cases, 710.  
     pleadings in, 696-697.  
     rule to appear and plead, 696.  
     common and special pleas, 696, 697.  
     issue, 697.  
     proceedings in, 676, 716.  
     to Circuit Court of the United States, 201.  
     to highest State courts, 212.  
     to Supreme Court of United States, 710.  
     writ of, 676.  
     writ of, affirmance of, 701.  
         amendable, 690.  
     amendment of and quashing writ, 690-691.  
     after return the writ may be amended, quashed, abated, or non prossed, 690.  
     defects amendable, 690.  
     defects for which the writ will be quashed, 690.  
     where the court will quash on motion, and where of its own accord, 691.  
     writ of, bail in, 685-687.  
     execution not to be stayed unless bail entered, 685.  
     Act of 1836, 685.  
     condition of the recognisance, 685.  
     bail not required of executors, &c., 686.  
     English statutes in force in Pennsylvania, 686.  
     execution already issued, to be stayed on payment of costs, 686.



**Error, continued.**

- appeals from Nisi Prius, security to be absolute, 686.
- bail by corporation, 686.
- form of recognisance, 686.
- by whom to be taken, 687.
- two sureties required, 687.
- amendment of recognisance, 687.
- notice to defendant of entry of bail, and exception to sufficiency, 687.
- waiver of oath and recognisance by defendant in error, 687.
- liability of bail, 687.
- defects in, 690.
- non prossing, 690.
- preliminaries and issue of writ of, 684-685.
- the præcipe, 684.
- tenor of the writ, 684.
- allowance, and special allocatur, 684.
- allowance of certiorari after judgment, 685.
- oath that the writ is not for delay, 685.
- where plaintiff in error is a corporation, 685.
- special allowance of writ out of the proper district, 685.
- return of the writ, 689.
- writ and record to be returned to Supreme Court, 689.
- plaintiff in error to see that proper return is made, 689.
- rule of court as to non pros., 689.
- rule in case of appeals, 689.
- reversal, 701.
- time within which must be taken, 683-684.
- limitation of seven years by the Act of 1791, 683.
- limitation by appeals, 684.
- bills of review, 684.
- certificate from Nisi Prius, 684.
- to Nisi Prius, 12.
- when not supersedeas, 688.
- (see Judgment, Arrest of.)
- (see Judgment, Opening.)
- (see Supersedeas.)
- Errors, what cured by verdict, 356.**
- Escheat, 38.**
- Escape, 1127.**
- Evidence, after discovery, 603.**
  - obtaining of out of the state, 48.
  - rejection of, 596.
  - (see Demurrer to Evidence.)
  - (see Depositions.)
  - (see Witnesses.)
- Examination, 509.**
- Examiner, 506.**
- Exception to commission, 523.**
  - (see Bills of Exception.)
- Execution; when it is allowable, 777.**
  - matters subsequent to the judgment, 779.
  - a change of parties, 779.
  - marriage, 779.
  - bankruptcy, 780.
  - death, 780.
  - purchase of judgment by third party, 780.
  - by what court execution is granted, 781.
  - feri facias, 781.
  - levari facias, 781.
  - venditioni exponas, 782.
  - capias ad satisfaciendum, 782.
  - attachment execution, 782.
  - mandamus execution, 782.

*Execution, continued.*

- sequestration, 782.
- testatum execution, 782.
- order in which executions may issue, 782.
- of contemporaneous writs, 783.
- of successive writs; alias, 785.
- personal estate, 786.
- stock, 787.
- coin and bank notes, 787.
- chattels pawned, &c., 787.
- goods of a stranger to the writ, 788.
- of sales by defendant fraudulent in law, 788.
- collusive sheriff's sale of defendant's goods, 790.
- actual fraud, 791.
- sale after notice of execution, 793.
- goods purchased by defendant but not delivered, 793.
- confusion of goods, 794.
- goods belonging to defendant's wife, 795.
- goods of defendant's son, 796.
- partnership goods, 796.
- chattels of a corporation, 797.
- choses in action, 797.
- fixtures, 798.
- growing crops, 800.
- chattels real, 800.
- real property, 800.
- fraudulent conveyances by defendant, 804.
- estate of a married woman, 805.
- after-acquired lands, 806.
- restricted judgment, 806.
- lands of decedent, 807.
- land aliened after the judgment, 807.
- life estate, 808.
- of exemption from execution, 809.
- the Act of 1836, 809.
- 1846, 810.
- militia, 811.
- the Act of 9th April 1849, 811.
- to what it applies, 811.
- debts contracted prior to the act, 812.
- what property is within the act, 812.
- value and kind of property exempted, 812.
- where the defendant is allowed to take money, 813.
- where property has been once exempted, 814.
- claim of exemption and demand of appraisement, 814.
- time of making the claim, 815.
- on what writs exemption must be claimed, 815.
- appraisement, 816.
- sale of land, 817.
- disregard by the officer of the claim for exemption, 817.
- waiver of exemption, 819.
- abandonment of claim, 819.
- effect of waiver, 819.
- privilege not assignable, 820.
- fraud on part of defendant forfeits his right, 820.
- of the claim under the Widow's Act, 820.
- in what cases the exemption may be claimed, 821.
- against what creditors or liens, 821.
- out of what property, 822.
- by whom the claim may be made, 822.
- manner and time of making the claim, 823.
- appraisement, 824.
- confirmation, 824.

**Execution, *continued.***

- appeal, 825.
- refusal to appraise, 825.
- waiver, 826.
- time after which execution may issue, 826.
- time within which execution must issue, 827.
- death of plaintiff, 828.
- death of defendant, 828.
- stay on account of a writ of error or appeal, 829.
- stay of execution by agreement, 830.
  - statute, 832.
- freeholders, 832.
- period of stay, 834.
- practice, 834.
- bail for stay of execution, 834.
- his security for thirty days, 835.
- bail for the full period, 835.
- time within which bail must be entered, 836.
- mode of entering bail, 836.
- exceptions to bail, 837.
- effect of entering bail, 838.
- the time of the stay, 838.
- as regards the plaintiff, 839.
- the defendant, 840.
- the surety, 840.
- discharge of surety, 840.
- waiver of stay of execution, 841.
- statutory stay in special cases, 841.
- soldiers, 841.
- executors and administrators, 841.
- mechanics' lien, 842.
- stay prohibited, 842.
- power of court to control executions, 842.
- staying and setting aside executions by the court, 844.
- injunction, 848.
- to what time the writ relates and what it binds, 849.
- by whom execution is to be sued out, 851.
- against whom execution may issue, 852.
- who is to execute it, 853.
- distringas, 855.
- authority of the sheriff, 855.
- liabilities, 857.
- liability to plaintiff, 858.
- indemnity, 858.
- abandonment of levy, 861.
- refusal to sell, 861.
- refusal to deliver, 861.
- not returning writ, 862.
- on return, 862.
- on receipt of money, 862.
- on distribution, 862.
- liability to defendant, 863.
- liability to third persons, 864.
- defences, 865.
- evidence, 866.
- measure of damages, 866.
- of the officer's compensation, 866.
- expenses, 867.
- the return day, 868.
- defective and irregular writs, 869.
- endorsement, 870.
- amount of the execution, 871.
- in debt on a bond, 871.
- form of the return, amendments, 873.

Execution, *continued.*

- effect, 874.
- as to the officer, 874.
- as to other persons, 875.
- neglect or misconduct of officer, 877.
- liability of plaintiff in execution, 877.
- what executions are void and what merely voidable, 879.
- the effect of void and voidable writs, 880.
- lost executions, 880.
- effect of a reversal of judgment after sale, 881.
- against goods and chattels, 881.
- the writ employed, 881.
- issuing the writ, 881.
- levy, 882.
- time, 882.
- manner of levy, 883.
- schedule or inventory, 885.
- effect of levy, 886.
- as regards the debtor, 887.
- as regards other creditors, 889.
- custody of the goods, 890.
- consequences of leaving the goods with defendant, 891.
- as relates to the officer, 891.
- as regards the plaintiff, 891.
- interference of the plaintiff with the process, 893.
- proceedings where the goods are claimed as the property of a stranger, 896.
- of indemnity, 897.
- sheriff's interpleader, 899.
- rule of the District Court, 902.
- the bond, 904.
- pleadings, 906.
- feigned issue, 907.
- payment by defendant to sheriff, 910.
- the sale and its incidents, 911.
- manner of sale, 911.
- who may purchase, 913.
- misconduct of purchaser, 913.
- delivery of goods, 913.
- payment, 914.
- effect of sale, 915.
- purchaser's title, 915.
- setting aside sale, 917.
- return to fieri facias, 918.
- time of return, 918.
- payment by sheriff, 919.
- payment into court, 921.
- distribution, 922.
- preferred claims, 922.
- the widow's claim, 922.
- the landlord's claim, 922.
- wages, 926.
- persons entitled, 929.
- practice, 929.
- miscellaneous, 929.
- conflict of creditors, 929.
- distribution among execution-creditors, 930.
- in case of partnership property, 932.
- surplus, 934.
- alias fieri facias, 934.
- venditioni exponas, 935.
- against choses in action; attachment-execution; execution against stock, 936.
- preliminary, 936.

**Execution, *continued.***

- nature of attachment-execution, 937.
- where it lies, 938.
- what may be attached, 939.
- debts, 940.
- debts equitably assigned, 942.
- things pawned, pledged, or demised, 946.
- legacies and distributive shares, 947.
- wages and salaries, 949.
- who may be made garnishee, 950.
- effect of attachment, 951.
- relations of garnishee with defendant, 954.
- sheriff's right to indemnity, 955.
- effect as to strangers, 955.
- practice, 956.
- when the writ may issue, 956.
- form of the writ, 957.
- service upon the defendant, 958.
- service upon the garnishee, 959.
- appearance and default, 959.
- the interrogatories, 960.
- answers, 961.
- pleadings, 964.
- defences, 966.
- set-off, 967.
- trial, 967.
- evidence, 968.
- witness, 969.
- verdict, 969.
- judgment, 969.
- appeal, 971.
- costs, 971.
- modes of obtaining satisfaction, 972.
- execution against stock, 973.
- stock held in the name of defendant, 973.
- where stock belonging to defendant is held in the name of another, 974.
- against real estate; *fi. fa.*, 975.
- preliminary, 975.
- nature and form of the writ, 976.
- levy, 976.
- setting aside levy, 979.
- abandonment of proceedings, 979.
- inquisition, 980.
- when necessary, 980.
- dispensed with in some cases, 980.
- may be waived, 981.
- when and where held, 982.
- proceedings, 983.
- return of the inquisition and *fi. fa.*, 984.
- approval by court, 986.
- proceedings where lands are extended, 986.
- liberari facias*, 986.
- costs, 989.
- retention of the lands by defendant, 989.
- notices, 990.
- where there are several liens on the land, 990.
- where judgments are entered subsequently to the extent, 991.
- proceedings after condemnation; *venditioni exponas*, 991.
- when the *vend. ex.* issues, 992.
- when necessary, 993.
- stay, 993.
- setting aside, 993.

*Execution, continued.*

- form of the writ, 993.
- who may execute it, 993.
- sheriff's sale of land, 994.
- time of sale, 994.
- notice and advertisements, 995.
- manner of sale, 1000.
- should not be in a lump, 1001.
- conditions, 1002.
- notices at the sale, 1004.
- who may be purchaser, 1005.
- misconduct on the part of purchaser, 1006.
- agreements between bidders, 1007.
- postponing the sale, 1008.
- effect of sale as notice, 1008.
- setting aside the sale, 1008.
- time of application, 1010.
- grounds for setting aside the sale, 1010.
- mere inadequacy of price, 1010.
- misdescription, 1012.
- mistake, 1012.
- misconduct, 1012.
- irregularities in the sale or process, 1012.
- failure of purchaser to comply with his contract, 1014.
- return to vend. ex., 1017.
- alias, 1018.
- of the sheriff's deed, 1018.
- of the deed generally, 1018.
- recitals, 1019.
- effect of deed as evidence, 1019.
- lost deeds, 1020.
- recording deed, 1020.
- custody of deeds not called for by purchaser, 1020.
- acknowledgment, 1020.
- the place where it is to be made, 1021.
- by whom, 1023.
- defective or informal return, deed, execution, or acknowledgment, 1024.
- manner and form of acknowledgment, 1026.
- how acknowledgment is proved, 1026.
- effect of acknowledgment, 1027.
- opposing the acknowledgment, 1029.
- acknowledgment when a lien-creditor becomes purchaser, 1030.
- of the receipt of the money by the sheriff, and his disposition of it, 1030.
- of the sheriff's receipt of the money, 1030.
- interest, 1031.
- where a lien-creditor becomes the purchaser, 1031.
- the rules of the District Court of Philadelphia, 1033.
- distribution by sheriff, 1034.
- payment of money into court, 1035.
- distribution of proceeds by the court, 1037.
- effect of the sale upon encumbrances, 1037.
- judgments, 1037.
- purchase-money, 1040.
- ground-rent, 1040.
- sheriff's recognisance, 1040.
- debts of decedent, 1041.
- legacies, 1041.
- municipal claims, 1041.
- taxes, 1042.
- mortgages, 1043.
- what prior liens will operate to discharge a mortgage, 1045.

**Execution, continued.**

- right to the proceeds, 1047.
  - claimant must have a lien, and such lien must have been discharged by the sale, 1047.
  - judgments and mortgages, 1049.
  - judgments confessed in preference of creditors, 1052.
  - judgments to secure future advances, 1053.
  - judgments and mortgages of married women, 1054.
  - miscellaneous, 1054.
  - discharge of judgments, 1055.
  - after-acquired land, 1057.
  - expired judgments, 1058.
  - assigned judgments, 1058.
  - set-off, 1059.
  - subrogation, 1060.
- order of payment, 1062.
  - judgments and mortgages, 1062.
  - preferred liens, 1064.
  - taxes and municipal claims, 1064.
  - wages, 1065.
  - other preferred claims, 1066.
  - arrears of ground-rent, 1066.
  - purchase-money, 1067.
  - miscellaneous, 1068.
  - partnership judgments, 1069.
- disposition of the surplus, 1070.
  - practice before auditors, 1071.
  - jurisdiction of court, 1071.
  - appointment, 1072.
  - powers at the hearing, 1073.
  - jurisdiction, 1074.
  - report, 1077.
  - compensation, 1078.
  - costs of audit, 1078.
  - feigned issue, 1079.
  - who may apply, 1079.
  - time of application, 1079.
  - mode of application, 1080.
  - grounds for granting the issue, 1081.
  - form of the issue, 1082.
  - trial; evidence; costs, 1083.
  - effect of issue, 1084.
  - error, 1085.
  - filing the report, 1087.
  - exceptions, 1087.
  - decree of distribution, 1089.
  - effect of decree, 1089.
  - appeal from decree, 1090.
  - who may appeal, 1091.
  - time of appealing, 1091.
  - manner of taking the appeal, 1092.
  - grounds, 1092.
  - effect of appeal upon the distributees, 1093.
  - of purchasers, 1093.
- purchaser's title, 1093.
  - record, 1094.
  - lis pendens, 1095.
  - actual notice, 1095.
  - constructive notice, 1096.
  - effect of irregularities in the judgment or subsequent proceedings, 1097.
  - sale under a void judgment, 1099.
  - sale under an expired judgment, 1100.
  - the quantity of land which passes, 1101.

*Execution, continued.*

- fixtures, 1101.
- grain growing, 1102.
- the estate which passes, 1102.
- purchaser's relations with a lessee of defendant, 1106.
- encumbrances and liabilities, 1108.
- purchaser as trustee, 1110.
- time to which the title of purchaser relates, 1111.
- proceedings to obtain possession, 1112.
  - notice, 1112.
  - petition to two justices, 1113.
  - warrant to the sheriff, 1113.
  - the inquisition, 1114.
  - record and award, 1114.
  - damages and costs, 1115.
  - delivery of possession, 1116.
  - certiorari, 1116.
  - proceedings where the terre-tenant disclaims, 1116.
  - where he names his grantor or lessor, 1117.
  - the recognisances, 1118.
  - the ejectment, 1118.
  - defences, 1120.
  - by wife who claims in her own right, 1120.
  - by terre-tenant claiming under a conveyance prior to the judgment, 1121.
  - where terre-tenant alleges the judgment was not a lien on the land, 1122.
  - where defendant had no notice of the writ, 1123.
- against the person ; *capias ad satisfaciendum*, 1124.
- where it lies, 1124.
- when it issues, 1124.
- form, 1125.
- service, 1126.
- privilege from arrest, 1126.
- escape, 1127.
- the sheriff's liability, 1127.
- return, 1128.
- proceedings subsequent to the arrest, 1129.
- satisfaction by payment, 1129.
  - by discharge, 1130.
  - by death of defendant, 1131.
- discharge under the Insolvent Laws, 1131.
  - Bread Act, 1133.
- imprisonment, 1134.
- effect of an arrest on a *ca. sa.*, 1134.
- testatum fieri facias*, 1135.
  - the lien of the writ, 1137.
  - satisfaction, 1137.
- fi. fa.* on a judgment transferred to another county, 1137.
- execution against a tract lying in two counties, 1139.
- execution upon judgments whose lien is restricted to a particular tract, 1141.
  - levari facias*, 1141.
  - form of the writ, 1141.
  - when it issues, 1142.
  - what may be levied on, 1142.
  - sale, 1143.
  - in what order, 1143.
  - to whom, 1144.
  - failure to sell ; *alias liberari*, 1144.
  - sheriff's deed, 1144.
  - purchaser's title, 1144.
  - distribution of proceeds, 1145.
- compelling distribution against joint defendants, 1145.



**Execution, *continued.***

- bill of discovery in aid of execution, 1146.
- jurisdiction, 1146.
- where it lies, 1146.
- against whom, 1147.
- form, 1147.
- scire facias, 1148.
- service, 1148.
- execution, 1149.
- against life estate, 1150.
- sequestration, 1151.
- against corporations, 1152.
- private corporations, 1152.
- in case there is property, 1153.
- how executed, 1153.
- proceedings for discovery of effects, 1154.
- where no property can be found; sequestration, 1154.
- where sequestration lies, 1155.
- against what, 1155.
- the form of the writ, 1155.
- the sequestrator, 1155.
- powers and duties, 1155.
- payment of debts, 1156.
- control exercised by the court, 1156.
- in case of a public work, 1157.
- object of proceeding, 1157.
- municipal corporations; mandamus; execution, 1158.
- where it lies, 1158.
- against what, 1158.
- the form, 1159.
- effect, 1159.
- special leave to take out, 689.
- when not to issue, 688.
- (see Warrant of Attorney.)

**Executors and administrators, costs of, 759.**

judgment against, 647.

**Exemplification of record, 496.****Exemption from execution.**

- the Act of 1836, 809.
- the Act of 1846, 810.
- militia, 811.
- the Act of 9th April 1849, 811.
- to what it applies, 811.
- debts contracted prior to the act, 812.
- what property is within the act, 812.
- value and kind of property exempted, 812.
- where the defendant is allowed to take money, 813.
- where property has been once exempted, 814.
- the claim of exemption and demand of appraisement, 814.
- time of making the claim, 815.
- on what writs exemption must be claimed, 815.
- appraisement, 816.
- the sale of land, 817.
- disregard by the officer of the claim for exemption, 817.
- waiver of exemption, 819.
- abandonment of claim, 819.
- effect of waiver, 819.
- privilege not assignable, 820.
- fraud on part of defendant forfeits his right, 820.
- of the claim under the Widows' Act, 820.
- in what cases the exemption may be claimed, 821.
- against what creditors or liens, 821.
- out of what property, 822.
- by whom the claim may be made, 822.

- Exemption from execution, *continued*.  
     manner and time of making the claim, 823.  
     appraisement, 824.  
     confirmation, 824.  
     appeal, 825.  
     refusal to appraise, 825.  
     waiver, 826.  
 Exhibits 509.
- Fee-bill, 12.  
     Act of February 22d 1821, 765.  
     of March 21st 1806, § 5, 766.  
     of 1814, § 26, 27, 766.  
     of April 11th 1825, 766.  
     of May 6th 1844, § 8, 767.
- Feigned issue, 1079.  
     costs in, 729.  
     (see Execution.)  
     (see Warrant of Attorney.)
- Fieri facias, 781.  
     on a judgment transferred to another county, 1137.
- Filing opinions—Act of 1806, 573.  
     Act of 1856, 573.  
     these acts do not prevent a bill of exceptions, 574.  
     opinion filed becomes part of the record, 574.  
     to be accompanied by statement of facts, 574.  
     when the request to be made, 574.  
     request of party must appear of record, 574.  
     reasons for rejecting or admitting evidence not to be filed, 575.  
     the acts make no change in the subjects of revision by Supreme Court, 575.
- Fines, 122.
- Fixtures, 1101 (see Execution.)
- Foreign attachment, costs, 728, 736.
- Form of verdict, 583.
- Former action, 470.  
     costs of, 742.  
     court will stay proceedings until all costs in former action are paid, 742.  
     both actions must be for the same cause, 742.  
     proceedings in ejectment, 743.  
     application for stay must be made to court in banc, 743.  
     refusal of court to stay is not ground for writ of error, 743.  
     Act of April 11th 1825, and August 2d 1847, 743.
- Fraud, 62, 75, 109.  
     when equity will release from, 98.  
     must be charged in bill, 98.  
     money obtained *malâ fide*, 98.  
     confusion of goods, 98.  
     inadequacy of price, 99.  
     improvidence, surprise, hardship, 99.  
     in judgment, 651.  
     (see Execution.)
- Freeholders (see Arrest).
- Gaming contract, 84.
- Garnishees, interrogatories to, 47.  
     (see Attachment Execution.)
- General verdict (see Verdict).
- Gloucester, Statute of, 734 (see Costs).
- Goods and chattels, execution against.  
     the writ employed, 881.

**Goods and chattels, execution against, *continued*.**

- issuing the writ, 881.
- levy, 882.
- time, 882.
- manner of levy, 883.
- schedule or inventory, 885.
- effect of levy, 886.
- as regards the debtor, 887.
- as regards other creditors, 889.
- custody of the goods, 890.
- consequences of leaving the goods with defendant, 891.
- as relates to the officer, 891.
- as regards the plaintiff, 891.
- interference of the plaintiff with the process, 893.
- proceedings where the goods are claimed as the property of a stranger, 896
- indemnity, 897.
- sheriff's interpleader, 899.
- rule of the District Court, 902.
- the bond, 904.
- pleadings, 902.
- feigned issue, 906.
- payment by defendant to sheriff, 910.
- the sale and its incidents, 911.
- manner of sale, 911.
- who may purchase, 913.
- misconduct of purchaser, 913.
- delivery of goods, 913.
- payment, 914.
- effect of sale, 915.
- purchaser's title, 915.
- setting aside sale, 917.
- return to fieri facias, 918.
- time of return, 918.
- payment by sheriff, 919.
- payment into court, 921.
- distribution, 922.
- preferred claims, 922.
- the widow's claim, 922.
- the landlord's claim, 922.
- wages, 926.
- persons entitled, 929.
- practice, 929.
- miscellaneous, 929.
- conflict of creditors, 929.
- distribution among execution-creditors, 930.
- in case of partnership property, 932.
- surplus, 934.
- alias fieri facias, 934.
- venditioni exponas, 935.
- custody of (see Execution).
- what may be taken in execution, 796-798.

Ground-rent, 1040.

Growing grain, 1102.

Guardian, costs, 762.

Habeas corpus, 142.

- ad testificandum, 544.

- in United States Courts, 219.

Idiots, equity jurisdiction over, 57.

Ignorance of law, 77.

Imprisonment, 1134.

Improvvidence, 99.

- Inadequacy of price, 99, 1010.
- Indemnity (see Execution).
- Index judgment, 627, 632.
- Infant defendant, costs, 762.
  - equity jurisdiction over, 57.
  - plaintiff, costs, 762.
- Informers, when allowed costs, 720.
- Injunction, 53, 75, 142.
  - when grantable, 85.
  - when not grantable, 88.
  - practice in granting, 88.
  - practice on dissolving, 88.
  - practice on hearing, 89.
  - answers and affidavits, 89.
  - when preliminary injunction will be awarded, 89.
  - security must be given except by commonwealth or municipalities, 89.
- Inquiry, writ of 407-418.
  - nature of, 407.
  - all writs awarded at same term to be executed together, 407.
  - Act of May 1772, 408.
    - March 1806, 409.
  - in what actions judgment by default is interlocutory, 409.
  - when the prothonotary may assess the damages, 409.
  - English practice, Pennsylvania practice, 410.
  - when writ of inquiry must be sued out, 411.
  - practice where there is judgment by default as to some defendants, and issue joined as to others, 411.
  - practice where there is judgment by default in action of debt, 412.
  - Act of 8 & 9 Wm. III., c. 11, s. 8, 412.
  - on official bonds scire facias issues to ascertain damages; suggestion of breaches, 414.
  - judgment by warrant of attorney is not within 8 & 9 Wm. III., 415.
  - but judgment without writ for payment by instalments are within the act, 415.
  - practice on bonds of indemnity, 415.
  - upon death of party scire facias must issue before writ of inquiry can be awarded, 416.
  - proceedings before the sheriff and his jury, 417.
  - effect of verdict of jury of inquiry, 417.
  - control of the court over the verdict, 417.
  - motion to set aside inquisition or to arrest judgment, 417.
  - if inquisition may be amended, 417.
  - release of excess of damages, 418.
- Inquisition, 1114.
  - may be amended, 417.
  - return of, 984.
- Insolvent debtors, 36.
- Instalments, damages payable by, 644.
  - what within Affidavit of Defence Law, 368.
- Interest, 1031.
  - (see Judgment, Interest on).
- Interlineations, 507.
- Interlocutory decrees, appeals from, 74.
- Interpleader 22, 38, 53, 78.
  - at common law, 427.
  - under the Act of 1836, 428.
  - it exists at common law in Pennsylvania, 428.
  - practice here—it differs from that in England, 430.
  - practice pointed out, 429-432.
  - what the petition should state, 432.
  - declaration or statement must be filed, 432.

**Interpleader, continued.**

- defendant in trover may use remedy, 433.
- order to pay money after final judgment, made in original suit, 434.
- party applying for interpleader must be a mere stakeholder, 434.
- Act of 1836 extended by Act of 1842 to the Nisi Prius of Philadelphia, 434.
- (see Execution).

**Interrogatories, 509.**

- to garnishees, 47.
- (see Attachment Execution).

**Inventory of sheriff, 885.****Irregularity, 1012, 1024, 1097.**

- (see Execution).

**Issue, 451-457.**

- in error, 697.
- in fact (see Demurrer).
- in law (see Demurrer).
- in matter before an auditor, 656.
- out of Registers' Courts, 35-36.
- to determine matters of fact, 81.
- to try questions of fact on opening judgments, 653-656.

**Joint action, severance of, 643.**

- defendants, compelling contribution against, 1145.

**Judge, duty of as to charging the jury, 568-569.**

- (see Bills of Exception.)
- (see Filing Opinions.)

**Judgment against deceased persons, 639, 642.**

- death of either party between verdict and judgment, 639.
- discretion of the court in entering judgment as of past time, 640.
- erroneously entered not void collaterally, 640.
- effect of death of one of several defendants before judgment, 640.
- practice in this state in regard to execution where debtor dies before judgment, 641.
- revival of judgments by scire facias against personal representatives, 641, 642.
- against executors or administrators, 647.
- against feme covert, 630.
- amendment of, 645, 649.
- common law and early statutes in regard to amendments, 645.
- power of court in altering or amending judgments, 645.
- power of Supreme Court to modify judgments, 646.
- void and voidable judgments, 646.
- judgments against executors or administrators, on the various pleas which may be filed by them, 647, 648.
- when plea of plene administravit is proper plea, 648.

**arrest of, 619, 621.**

- after judgment arrested, a new action must be brought within one year, 619.
- costs must also be paid, 619.
- reasons for arrest of judgment, 619.
- causes of arrest must appear on the record, 619.
- whatever may be alleged in arrest of judgment must be such matter as would be fatal upon demurrer, 620, 621.
- certain defects cured by verdict, 621.
- after judgment on demurrer, judgment cannot be arrested, 621.
- if judgment be erroneously arrested, Supreme Court will correct on error, 621.
- may be arrested for objection on face of record, though such objection be not made at time of filing motion, 621.
- will be arrested where court has no jurisdiction, 621.
- as in case of nonsuit, 528.
- assigned (see Execution).

*Judgment, continued.*

- assignment of, 666, 667.
  - when execution may issue by owner of, without assignment, 666.
  - assignment of, carries with it a mortgage to secure bond on which it was entered, 666.
  - equities between original parties, 667.
  - no covenant or warranty implied by assignment, 667.
  - doctrines of notice, 667.
  - by confession, 392.
- by confession is—by *cognovit actionem*; by warrant of attorney, 392.
  - cognovit*, 392.
  - what it is, 392.
  - stay of execution under Acts of 1806 and 1836, 393.
  - given, either before plea or after, in English practice, 393.
  - practice when the *cognovit* does state the amount of damages, 393.
  - formerly judgment, though not for a liquidated amount, bound real estate, 394.
  - but now amount must be ascertained or ascertainable, 395.
  - by agreement under rule of court must state cause of action, 395.
  - confessed by one partner is a nullity as to the other, 395.
  - Act of March 21st 1806, § 5, 396.
  - prothonotary may enter, on *cognovit* under Act of 1806, 396.
  - when confession of action is implied, 396.
  - valid without narr. under act, 397.
  - warrants of attorney, 397.
  - what it is, 397.
  - what it should contain, 398.
  - how to be executed, 398.
  - mode of entering judgment under it, 399.
  - Act of February 24th 1806, § 28, practice under it, 400.
  - of the judgment by virtue of the warrant, 401.
  - special stipulations in the warrant, their effect, 401.
  - who may give warrants of attorney, 402.
  - English decisions relative to entering up, on old warrants of attorney, 403.
  - remedy of defendant where judgment has been improperly entered, 403.
  - feigned issue may be awarded to try disputed facts, 404.
  - entered on warrant in one county cannot be entered on same warrant in another county, 405.
  - agreement in restraint or enlargement of the execution, 406.
  - by default, 274.
    - for want of an affidavit of defence, 365.
    - by *non sum informatus*, 365.
    - by *nil dicit*, 365.
    - as to some defendants, and issue as to others, 411.
    - costs of, 738.
    - effect of irregularity in, 390.
    - in what action interlocutory, 409.
    - when final, 387.
  - by *nil dicit*, 386.
  - by *non sum informatus*, 386, 390.
  - non sum informatus* not in use, 386.
  - by default for want of a plea, 386.
  - rule to plead, 386.
  - by default is final, 357.
  - irregularity in entry of judgment by default, its effect, 390.
  - confessed, 1052.
  - entering, 624.
    - four days allowed upon verdict for motion for new trial or in arrest of judgment, 624.
    - the jury fee, 624.
    - computation of time, 625.

**Judgment, entering, *continued.***

- time allowed for filing exceptions to award under Act of 1705, 626.
- the entry of, by prothonotary on court docket, 626.
- the judgment index—its purposes, objects, and effects, 627.
- special judgments and judgments with conditions, 628.
- judgment for costs on settlement of case on trial-list, 629.
- against a feme covert on a bond given while sole, 630.
- on confession in writing, 631.
- nunc pro tunc, 631.
- requisites of verdict, 631.
- Act of April 3d 1843, in regard to failure or omission of prothonotary, before its passage, to enter judgments on the judgment index, 632.
- Act of April 16th 1849, in relation to effect of Act of 1843, 632.
- entry of satisfaction of, 669, 672.
  - Act of 1791, to enforce, 669.
  - what may be equivalent to, 669.
  - what judgments are within the Act of 1791, 670.
  - fraudulent, 670.
  - Act of 1851 in regard to, of judgments over ten years old, 672.
- expired (see Execution).
- final in United States Courts, 212.
- final, what it is, 678.
- final writ of error lies to, 678.
- follows verdict, 589.
- for amount admitted to be due, 375.
- for costs, 629.
- for default of appearance in real actions, 242.
- for want of affidavit of defence, 365.
- for want of a plea, 386.
- index, 627, 632.
- interest on, 649.
  - given as security, 649.
- interest suspended from the day when land is sold on execution, 649.
  - after affirmance of, in the Supreme Court, 649.
  - on verdict, 649.
- joint, 642, 645.
  - against one partner in a suit against two, without service or return of nihil habet against the other, 642.
  - assessment of damages in assumpsit against several, where some appear and some make default, 643.
  - severance of joint action, 643.
  - distinct judgments on same record, 643.
  - on a verdict for damages payable by instalments, 644.
  - where one of two defendants is in default, 644.
  - damages assessed conditionally, 644.
  - form of verdict in debt, where debt and interest exceed the sum demanded in writ, 645.
  - in action for legacy charged on real estate, 645.
- lien of, 632, 637.
  - what interest in land is bound by, 632.
  - against equitable vendee—interest of assignor in unconverted estate, 633.
  - effect of revival of, by *scire facias post annum et diem*, 633.
  - how priority of, governed in various cases, 634.
  - entered on same day, 634.
  - contest between judgment and mortgage, and between judgment and conveyance, 635.
  - against vendee of land before conveyance of legal title, 635.
  - ground-rent and of arrears of same, 635.

**Judgment, lien of, *continued.***

- for purchase-money, 635.
- transcripts of, before magistrate in Common Pleas, 637.
- revival of such, by scire facias, 637.
- in Supreme Court of the state, and in Circuit Court of U. S. United States, 638.
- in United States Courts, 174.
- manner of taking, 276.
- may be modified by Supreme Court, 702.
- Nisi Prius may enter, 10.
- nunc pro tunc, 631, 640.
- of non pros., 363.
- of non pros. moved for in open court, 530.
- of nonsuit, 363.
- on balance found due defendant, 650.
- on cognovit valid without narr., 397.
- on confession, 631.
- on demurrer, 493.
- on noli tuel record, interlocutory a final one, 497.
- on transcript, 659.
- on writ of error (see Error, Judgment on).
- opening, 651, 665.
- over ten years old, entry of, 672.
- power to modify, 646.
- priority of, 634.
- restricted (see Execution).
- revival against personal representatives, 641, 642.
- revival of by scire facias, 633.
- time at which may be taken, 274.
- transfer of to other counties, 668.
- at what time an award of arbitrators is the subject of transfer, 668.
- power of the court of the county, to which it is transferred, over it, 668.
- special, 628.
- void and voidable, 646.
- with condition, 628.
- (see Attachment Execution.)
- (see Cognovit.)
- (see Execution.)
- (see Warrant of Attorney.)

**Judicial districts of the Supreme Court, 3.****Jurisdiction, appellate to District Courts and to state courts, 166.**

- arrest of judgment for want of, 621.
- by removal from District Court, 158.
- by removal from state courts, 158.
- of Common Pleas, 22, 25.
- of Circuit Court of the United States, 145.
- of District Court, 16, 18.
- of real actions, 278.
- of Supreme Court of United States, 198.
- of United States District Court, 138, 143.
- plea to, 443.
- when it must be pleaded, 443.
- must be specially pleaded, 444.
- pleas to, 442.
- (see Supreme Court, Nisi Prius.)

**Juror, entitled to daily pay and mileage, 538.**

- exemption, liability, and pay, 538.
- certain persons exempt from serving as jurors, 538.
- certain persons privileged, 538.
- Act of 1834, § 136, 538.
- who has served during the year not to be returned to wheel, 538.
- liable to fine for non-attendance, 539.
- entitled to certificate for attendance, 539.
- who privileged from serving, 538.



*Juror, continued.*

- withdrawing, 567.
    - parties may agree to, 567.
    - or judge may direct, 567.
    - when it should be done, 567.
    - failure of a juror to appear after being sworn, 567 (see Jury; Jury, Conduct of).
  - mode of selecting in District Court, 15.
  - who are exempt (see Jury).
- Jury, 560, 568.
  - proceedings to obtain, and herein of challenging, 560.
  - special juries, 560.
  - striking a, 560.
  - challenges, 561.
  - to the array, 561.
  - to the polls, 561.
  - peremptory, 561.
  - for cause, 561.
  - drawing a jury, 562.
  - swearing the jury, 562.
  - names drawn to be kept in a panel, 562.
  - second jury called in another cause from the same general panel, 563.
  - jurors presumed properly sworn, 563.
  - sworn to try all the issues, 563.
  - talesmen, 563.
  - proceedings before the jury, 564.
    - opening the case and examining witnesses, 564.
    - right to be heard in person or by counsel, 564.
    - order of opening the case, 564.
    - defence not to be opened by cross-examination, 564.
    - rules of court, 564.
    - party to state points to be proved, 564.
    - examination of witness to be regulated by the judge, 564.
    - one counsel to examine, 565.
    - examination on *voire dire*, 565.
    - proving interest by other evidence, 565.
    - party objecting is to show interest, 565.
    - purpose of evidence to be stated, 565.
    - evidence to be shown relevant by subsequent evidence, 566.
    - time and manner of examining witnesses a matter of discretion for the court, 566.
  - withdrawing a juror, 567.
    - parties may agree to, 567.
    - or judge may direct, 567.
    - when it should be done, 567.
    - failure of a juror to appear after being sworn, 567
  - summing up by counsel, 568.
  - rules of court, 568.
  - in District Court and Common Pleas only one counsel on each side allowed to sum up, 568.
  - order of addressing the jury, 568.
  - in *Nisi Prius* number of counsel not limited, 568.
  - party maintaining the affirmative of the issue begins and concludes, 568.
  - attorney may be a witness, but the court may forbid his addressing the jury, 568.
  - charging the jury, and herein of points to be charged upon, 568.
  - in general, 568.
  - rules of District Court, 569.
  - rules of Common Pleas, 569.
  - points must be presented in proper time, 569.
  - court not bound to give opinion on facts, 569.
  - but may on the weight of evidence, 569.
  - common and special, 531, 536.

*Jury, continued.*

- conduct of, 577, 578.
- conduct of the, and herein of what papers they may take out, 577.
- juror having knowledge of the case to disclose the same in open court, 578.
- filing papers affecting the merits of matters in issue, 578.
- what papers the jury may take out, 578.
- may come back to resolve doubts, 578.
- decision of, generally conclusive, 590.
- fee, 624.
- irregularity in impannelling, 614.
- process, 531, 532.
- of the venire, 531.
- Act of April 14th 1834, 531.
- mode of directing panels of jurors to be selected and returned, 531, 532.
- challenge to the array, 532.
- what papers they may take out, 578 (see Charge; Counsel, Summing Up by).

Justices of the peace (see Appeal, Costs on).

Landlord's claim (see Execution).

Legacies, 1041.

Lessee, in case of sheriff's sale, 1106.

Letters rogatory, 38.

- by law of nations, 526.
- court will compel attendance of witnesses, 527.
- court executing the commission will not decide points of regularity or irregularity, under practice of the court whence the letters come, 527.

Levari facias, 781.

- form of the writ, 1142.
- when it issues, 1142.
- what may be levied on, 1142.
- sale, 1143.
- in what order, 1143.
- to whom, 1144.
- failure to sell; alias liberari, 1144.
- sheriff's deed, 1144.
- purchaser's title, 1144.
- distribution of proceeds, 1145.

Levy (see Execution), 861, 882.

Libels against vessels, 36.

Liberari facias, 986.

Lien for purchase-money, 635.

- of ground-rent, 635.
- of judgment, 632.
  - against equitable vendee, 633.
  - before magistrate, 637.
  - in Supreme Court, 638.
  - in United States Court, 638.
- of judgments entered the same day, 634.
- on land (see Execution).
- specific, 79.
- what on land bound by judgment, 632.
- (see Judgment, Lien of.)

Life estate, execution against (see Execution), 1150.

sequestration, 1151.

Limitation as to new suit, 708.

Lis pendens, 1095.

foreign, 444.

Lost bonds, 62.

- deeds, 35, 47, 62.
- executions, 880.
- records—testimony to perpetuate, 22.

- Lunacy, costs in, 729, 740.  
 Lunatics, equity jurisdiction over, 57.
- Mandamus, 38, 1158.  
     costs on, 723, 729.  
     execution, 782.  
     in United States Courts, 219.
- Married women, equitable rights of, 55.  
     judgments and mortgages of, 1054.  
     (see Execution.)
- Marshal, United States, 135.
- Masters, reference to, 60.
- Mechanics' lien, 20.
- Mileage, 768.
- Minor, penalty for marrying, 21.
- Misdirection of court, 594.
- Misdescription, 1012.
- Misconduct, 1012.  
     by party, 602.
- Misrepresentation, 80.
- Mistake, 62, 110, 610, 1012.  
     of law, 77.
- Mortgage, 55, 1043.  
     satisfaction on, 35.
- Motion—purpose of, 1161.  
     must be in writing and filed, 1161.  
     for rule to show cause, 1161.  
     depositions on adverse side not received on, but parties fully heard  
         on argument, 1161.  
     affidavit for rule, 1161.  
     copy of rule to be served, 1161.  
     continuance of rule, 1161.  
     difference between English and Pennsylvania practice on showing  
         cause, 1162.  
     argument list, 1162.  
     rules of course, 1162.  
     rule to take depositions, 1162.  
     notices, on whom to be served, 1163.  
     rules of District Court (note), 1163.  
     summary relief on, 1163.  
     the suitor or witness privileged from arrest, 1164.  
     the defendant, from ejectment when willing to surrender land, 1164.  
     for new trial, 590–618.  
     in arrest of judgment, 619.  
     to open judgment, 651.  
     to quash writ of error, 691.  
     to take off nonsuit, 590.
- Municipal claims, 1041.  
     corporations (see Corporations, Execution against).
- Name, power to change, 38.
- Names of judges of Supreme Court elected (see Supreme Court).
- Narrs. on appeal, 357.
- Neglect (see Execution).
- New assignment, 485.
- New trial—when motion for, to be made, 589, 590.  
     granting this motion matter of discretion for the court, 590.  
     decision of jury on issue in fact generally conclusive, 590.  
     practice in relation to (note), 590.  
     two classes of cases to be considered on motions for, viz.: where  
         nonsuit is entered, and where party has been surprised by unex-  
         pected evidence, 591.  
     motion for, not a waiver of bill of exceptions, 594.

*New trial, continued.*

- grounds of motion for, 594.
  - misdirection of court, 594.
  - error in admission or rejection of evidence, 596.
  - verdict against law, 598.
  - verdict against evidence, 598.
  - irregularity of jurors, 600.
  - misconduct by prevailing party, 602.
  - after-discovered evidence—the evidence must have been discovered since the former trial; it must be such as could not have been secured on the former trial by reasonable diligence on the part of the losing party; it must be material in its object, and not merely cumulative and corroborative or collateral; it must be such as ought to produce on another trial an opposite result on the merits, 603–607.
  - absence, 608.
  - want of notice, 610.
  - mistake, 610.
  - surprise, 611.
  - irregularity in impannelling jury, 614.
  - unsuitable damages, 614.
  - time and form of notice, 615.
  - terms and costs, 618.
  - motion for, in equity, 120.
- Nil debet*, 458.
- Nisi Prius*, Affidavit of Defence Law extended to, 368.  
certificate from, 677.  
(see Courts, Supreme Court.)
- Nolle prosequi*—what is a, 480.  
resembles the discontinuance, 481.  
in replevin and feigned issue the plaintiff cannot enter it, 481.  
may be entered as to some counts in the narr. and not as to others, 481.  
effect of demurrer, 481.  
may be entered so as to withdraw part of the cause or action in a single count, 482.  
effect of defendants joining in their pleas, 482.  
effect of severing in their pleas, 482.  
in actions of tort against several may be entered any time before final judgment, 482.  
entry of, as to whole narr. entitles defendants to costs, 482.
- Non assumpsit*, 457.  
in equity, 112.
- Non compotes mentis*, 52.  
jurisdiction over, 48.
- Non est factum*, 458.
- Non pros.*—trial by proviso; account of its history, 527.  
no longer exists in this state, 528.  
Act of 1767, 528.  
difference between English and Pennsylvania statute, 528.  
practice under our statute, 528.  
judgment as in case of a nonsuit, 528.  
rule for trial or non pros., 529.  
cause must be at issue or rule to try or non pros. cannot be enforced, 529.  
rule for trial or non pros. not discharged by continuance by consent, 530.  
is discharged by plea subsequently added, 530.  
rule for trial or non pros. if long pending, defendant must give notice of his intention to proceed, 530.  
judgment of, must be moved for in open court, 530.  
judgment of, is final for costs, 530.  
in Supreme Court, 689.

Non pros., *continued*.

judgment of, when court will take off, 363.  
practice under, 364.

Non solvit, 461.

Nonsuit (see New Trial).

voluntary, 578.

Act of 1814, preventing nonsuit after jury ready to deliver verdict, 579.

compulsory, 579.

Act of 1836, 579.

rules of court, 579.

motion to take off must be made within four days, 580.

bill of exceptions within ten days, 580.

when court may direct nonsuit, 580.

not a bar to subsequent suit, 580.

Act of 1846, 580.

for not proceeding to trial, 581.

judgment of, 363.

under Act of 1812, 531.

Non sum informatus, judgment on, 386, 390.

Notice of equitable matter, 110.

of set-off, 465.

of special matter, 465.

of special matter in equity, 113.

of taking depositions (see Depositions).

to produce, 542.

to produce books and papers under act, 544, 550.

to purchaser, 1094-1096.

to take depositions, 504-506.

want of, 608.

Notices, 1163.

Nuisances, removal of, 21.

Nul tiel record, 458, 494.

Officers of the court—prothonotaries must be sworn, 125.

must give sureties to be approved, 125.

their duties, powers, responsibilities, 126.

sections 76 and 77 of Act of 1834; cannot practise as attorneys in their own courts, 126.

prothonotary of the District Court of Philadelphia, to perform like duties, to receive like fees, and give like security as the prothonotary of the Common Pleas, 126.

criers, tipstaves, and constables, 126.

judges to appoint, 126.

criers and tipstaves in Supreme Court and in Nisi Prius, 127.

commissioners, 127.

sheriffs and coroners, 127.

county officers, 127.

commissioned upon giving bond, 127.

bond must be approved, 127.

coroner—his duties, 128.

Official bonds (see Writ of Inquiry).

costs on, 722.

misconduct, power to punish, 122.

Opening judgments—by whom the motion may be made and for whose use;

opening a judgment directly and collaterally; effect and nature of fraud in relation to judgments, 651.

practice of the several courts in regard to issues to try questions of fact, 653-656.

how an issue may be obtained in the Court of Common Pleas in a matter before an auditor of the Orphans' Court, 656.

what character of defence must be shown, 657.

Opening judgments, *continued*.

judgment on a transcript filed in the Common Pleas cannot be opened to let the defendant into a defence, 659.  
 what excuse given for default, 659.  
 within what time motion must be made, 660.  
 practice in opening judgments, 661.  
 how far the decision of a court of original jurisdiction on a motion to open is the subject of review on error, 665.

Opening the case, 564-566.

Opinion (see Remittitur).

filing of, 573.

Orphans' Court, appeal, 679.

Oyer—profert, 420.

when demandable, 421.

in what actions, 421.

of what demandable, 422.

of what not demandable, 422.

when oyer is absolutely necessary, 422.

Panel, 562.

Paper-books, 698.

Parol demurrer, 444.

Partition, 33, 38.

costs in, 721.

Partner (see Judgment, Joint).

Partnership, 65.

equity jurisdiction over, 52.

property (see Execution).

Party, absence of, 557.

Passenger Act, 142.

Payment, 108.

by instalments (see Writ of Inquiry).

by sheriff, 919-921.

into court, 1035.

of costs, mode of enforcing, 769.

of money into court, 420, 435.

what it is, 435.

when it should be done a difficult question for counsel, 435.

the Act of 1703, 435.

of money into court, costs of (see Tender; Costs).

order of under sheriff's sale, 1062.

judgments and mortgages, 1062.

preferred liens, 1064.

taxes and municipal claims, 1064.

wages, 1065.

other preferred claims, 1066.

arrears of ground-rent, 1066.

purchase-money, 1067.

miscellaneous, 1068.

partnership judgments, 1069.

replication of non solvit, 461.

to sheriff, 910-914.

under Defalcation Law, 466.

what evidence may be given under it, 460, 461.

with leave, 110, 461.

Penalty for marrying a minor, 21.

Per diem, 768.

Peremptory pleas, generally, 450.

by way of traverse, 451.

issue, 451.

short pleas, 452.

demurrer or issue in law, 452.

joinder in issue, 452.

making up issue, 452.

case must be at issue before it can be tried, 453.

**Peremptory pleas, *continued*.**

- effect of nonjoinder of issue, 453.
- entries on prothonotary's docket, 453.
- issues are general and special, 454.
- general issues, 455.
- practice under in Pennsylvania, 456.
- special pleading in Pennsylvania, 457.
- non assumpsit, 457.
- non est factum, nil debet, and covenants performed, 458.
- general issue non est factum, 458.
- nil debet, 458, 459.
- nul tiel record, 458, 459.
- covenants performed, 459, 460.
- payment, 460.
- what evidence may be given under it, 460.
- payment with leave, 461.
- replication of non solvit, 461.
- not guilty, non detinet, non cepit, 462.
- general issue in replevin, 462.
- special matter and set-off, 463.
- Act of 1705, 463.
- defalcation, 463.
- Act of 1836, 464.
- the old act for defalcation, 464.
- difference between British and Pennsylvania Defalcation Acts, 464.
- rules of the Supreme Court and Common Pleas (note), 465.
- notice of set-off and of special matter encouraged, 465.
- notice of set-off must correctly describe demand, 465.
- substance of notice of special matter, 465.
- payment under the Defalcation Law, 466.
- classification of decisions under set-off—as to claim; as to parties; as to practice, 466-467.
- double pleas, 469.
- at common law defendant could plead only one plea, 469.
- statute of 4 Ann. chap. 16, 469.
- several matters may be pleaded to plea in bar, 470.
- this not allowed in dilatory pleas, 470.
- former action and attachment, 470.
- short pleadings, 471.
- a very common but informal practice, 471.
- must be received by consent, 471.
- party if required must draw up his plea at large, 471.
- pleas should not be so brief as to be insensible, 471.
- striking off, adding, or altering pleas, 471.
- when court will strike off a plea, 471.
- amendment, 472-473.
- courts have power to make general rules as to pleadings, 474.
- variance, 474.
- defendant may add plea after issue joined, 474.
- Performance (see Equity).
- Perpetuating testimony, 48, 99.
  - in equity, 75.
- Philadelphia county, special provisions relating to juries, 535.
- Plaintiff, liable for fees, 771.
- Pleading and practice in equity (see Equity).
- Pleading (see Attachment Execution; Pleas; Pleas Puis Darrein Continuance; Statement).
  - departure in, 485.
  - special in Pennsylvania, 457.
  - in error (see Error, Pleadings in).
- Pleas—dilatory, 442.
  - peremptory, 442.
  - to the jurisdiction, 442.

Pleas, *continued*.

- in suspension of the action, 442.
- in abatement of the writ, 442.
- dilatory pleas.
  - in bar of the action, 442.
  - rules of court, 442.
  - dilatory pleas must have affidavit, 442.
  - to the jurisdiction, 443.
  - must be pleaded before plea in bar, 443.
  - defect of jurisdiction fatal, 443.
  - must be specially pleaded, 444.
  - in suspension of action, 444.
  - number of these pleas small, 444.
  - parol demurrer, 444.
  - foreign *lis pendens*, 444.
  - in abatement of the writ, 444.
  - grounds for this plea, 444.
  - must relate to the person, to the court, or to the writ, 444.
  - to the person of the plaintiff, 445.
  - to the person of the defendant, 445.
  - to the declaration, 446.
  - to the writ, 446.
  - power of using these pleas much abated, 446.
  - when plea in abatement cannot be pleaded, 447.
  - in abatement and pleas in bar cannot be filed together, 448.
  - must be verified by affidavit, 449.
  - second plea in abatement may be pleaded, 449.
- in bar, 450.
  - peremptory pleas generally, 450.
  - what is peremptory plea, 450.
  - divided into by way of traverse and by way of confession and avoidance, 451.
  - by way of traverse, 451.
  - issue, 451.
  - short pleas, 452.
  - demurrer or issue in law, 452.
  - joinder in issue, 452.
  - making up issue, 452.
  - case must be at issue before it can be tried, 453.
  - effect of nonjoinder of issue, 453.
  - entries on prothonotary's docket, 453.
  - issues are general and special, 454.
  - general issues, 455.
  - practice under in Pennsylvania, 456.
  - special pleading in Pennsylvania, 457.
  - non assumpsit, 457.
  - non est factum, nil debet, and covenants performed, 458.
  - general issue non est factum, 458.
  - nil debet, 458, 459.
  - nul tiel record, 458, 459.
  - covenants performed, 459, 460.
  - payment, 460.
  - what evidence may be given under it, 460.
  - payment with leave, 461.
  - replication of non solvit, 461.
  - not guilty, non detinet, non cepit, 462.
  - general issue in replevin, 462.
  - special matter and set-off, 463.
  - Act of 1705, 463.
  - defalcation, 463.
  - Act of 1836, 464.
  - the old act for defalcation, 464.
  - difference between British and Pennsylvania Defalcation Acts, 464.
  - rules of the Supreme Court and Common Pleas (note), 465.



*Pleas, continued.*

- notice of set-off and of special matter encouraged, 465.
- notice of set-off must correctly describe demand, 465.
- substance of notice of special matter, 465.
- payment under the Defalcation Law, 466.
- classification of decisions under set-off—as to claim; as to parties; as to practice, 466-467.
- double pleas, 469.
- at common law defendant could plead only one plea, 469.
- statute of 4 Ann. chap. 16, 469.
- several matters may be pleaded to plea in bar, 470.
- this not allowed in dilatory pleas, 470.
- former action and attachment, 470.
- short pleadings, 471.
- a very common but informal practice, 471.
- must be received by consent, 471.
- party if required must draw up his plea at large, 471.
- should not be so brief as to be insensible, 471.
- striking off, adding, or altering pleas, 471.
- when court will strike off a plea, 471.
- amendment, 472-473.
- courts have power to make general rules as to pleadings, 474.
- variance, 474.
- defendant may add plea after issue joined, 474.
- puis darrein continuance, 558.
  - when to be pleaded, 558.
  - what may be pleaded, 558.
  - in abatement, 559.
  - in bar, 559.
  - how to be drawn, 559.
  - effect of this plea, 559.
  - costs, 560.
- of plene administravit, 648.
- adding, 471-474.
- altering, 471-474.
- in bar (see *Peremptory Pleas; Pleas*).
- in equity, 107.
- short, 453-471.
- striking off, 471-474.
- Points reserved (see *Charging the Jury*).
  - Act of 1835, 588.
  - extended to Common Pleas, 588.
  - requisites of, 588.
  - rules of court as to the bill of exceptions, 588.
- Possession—proceedings to obtain, under sheriff's sale, 1112.
  - notice, 1112.
  - petition to two justices, 1113.
  - warrant to the sheriff, 1113.
  - the inquisition, 1114.
  - record and award, 1114.
  - damages and costs, 1115.
  - delivery of possession, 1116.
  - certiorari, 1116.
  - proceedings where the terre-tenant disclaims, 1116.
  - where he names his grantor or lessor, 1117.
  - the recognisances, 1118.
  - the ejectment, 1118.
  - defences, 1120.
  - by wife who claims in her own right, 1120.
  - by terre-tenant claiming under a conveyance prior to the judgment, 1121.
  - where terre-tenant alleges the judgment was not a lien on the land, 1122.
  - where defendant had no notice of the writ, 1123.

- President judge of one district may sit in another, 23.
- Private corporations, equity jurisdiction over, 52.
- Privilege from arrest, 245.
  - from suit, 245.
- Procedendo, 702.
- Proceedings before the jury, 564-566.
- Process—*Nisi Prius* may issue, 11.
  - serving on parties out of jurisdiction, 33
  - tax on, 245.
- Production of books and papers, 544-550.
  - of books in United States Courts, 185.
- Prothonotary (see Officers of the Court).
  - writ for fees, 771.
- Purchase-money, 1040.
- Purchaser's title under sheriff's sale.
  - notice to affect the purchaser, 1094.
  - record, 1094.
  - lis pendens*, 195.
  - actual notice, 1095.
  - constructive notice, 1096.
  - effect of irregularities in the judgment or subsequent proceedings, 1097.
  - sale under a void judgment, 1099.
  - sale under an expired judgment, 1100.
  - the quantity of land which passes, 1101.
  - fixtures, 1101.
  - grain growing, 1102.
  - the estate which passes, 1102.
  - purchaser's relations with a lessee of defendant, 1106.
  - encumbrances and liabilities, 1108.
  - purchaser as trustee, 1110.
  - time to which the title of purchaser relates, 1111.
- Quo warranto, 38.
  - jurisdiction of Common Pleas in, 31.
- Real estate, execution against 975.
  - preliminary, 975.
  - nature and form of the writ, 976.
  - levy, 976.
    - setting aside levy, 979.
  - abandonment of proceedings, 979.
  - inquisition, 980.
    - when necessary, 980.
  - dispensed with in some cases, 980.
  - may be waived, 981.
  - when and where held, 982.
  - proceedings, 983.
  - return of the inquisition and *fi. fa.*, 984.
  - approval by court, 986.
  - proceedings where lands are extended, 986.
  - liberari facias*, 986.
  - costs, 989.
  - retention of the lands by defendant, 989.
  - notices, 990.
  - where there are several liens on the land, 990.
  - where judgments are entered subsequently to the extent, 991.
  - proceedings after condemnation; *venditioni exponas*, 991.
  - when the *ven. ex.* issues, 992.
  - when necessary, 993.
  - stay, 993.
  - setting aside, 993.
  - form of the writ, 993.
  - who may execute it, 993.

**Real estate, execution against, *continued.***

sheriff's sale of land, 994.  
 time of sale, 994.  
 notice and advertisements, 995.  
 manner of sale, 1000.  
 should not be in a lump, 1001.  
 conditions, 1002.  
 notices at the sale, 1004.  
 who may be purchaser, 1005.  
 misconduct on the part of purchaser, 1006.  
 agreements between bidders, 1007.  
 postponing the sale, 1008.  
 effect of sale as notice, 1008.  
 setting aside the sale, 1008.  
 time of application, 1010.  
 grounds for setting aside the sale, 1010.  
 mere inadequacy of price, 1010.  
 misdescription, 1012.  
 mistake, 1012.  
 misconduct, 1012.  
 irregularities in the sale or process, 1012.  
 failure of purchaser to comply with his contract,  
     1014.  
 return to ven. ex., 1017.  
 alias, 1018.  
 of the sheriff's deed, 1018.  
 of the deed generally, 1018.  
 recitals, 1019.  
 effect of deed as evidence, 1019.  
 lost deeds, 1020.  
 recording deed, 1020.  
 custody of deeds not called for by purchaser,  
     1020.  
 acknowledgment, 1020.  
 the place where it is to be made, 1021.  
 by whom, 1023.  
 defective or informal return, deed, execution, or  
     acknowledgment, 1024.  
 manner and form of acknowledgment, 1026.  
 how acknowledgment is proved, 1026.  
 effect of acknowledgment, 1027.  
 opposing the acknowledgment, 1029.  
 acknowledgment when a lien-creditor becomes  
     purchaser, 1030.  
 of the receipt of the money by the sheriff, and  
     his disposition of it, 1030.  
 of the sheriff's receipt of the money, 1030.  
 interest, 1031.  
 where a lien-creditor becomes the purchaser, 1031.  
 the rules of the District Court of Philadelphia,  
     1033.  
 distribution by sheriff, 1034.  
 payment of money into court, 1035.  
 distribution of proceeds by the court, 1037.

sale of, 38.

**Receiver in equity, 102.**

**Recognisance for costs, 756.**

forfeited, 38.

**Record, diminution of, 692, 693.**

where the whole, is not certified, 692.

court below is to decide as to the completeness of, 692.

what is part of, 692.

certiorari to bring up the rest of, 692.

**Record, *continued.***

- where part of, is lost, 693.
- face of, must show objection to arrest judgment, 621.
- on writ of error must be returned to Supreme Court, 689.
- trial by, 494.

**Recovery of costs (see Costs).****Reference, costs on (see Costs).****Referee (see Costs).****Remittitur, 704.****Act of 1836, 704.**

- record must be actually remitted, 705.
- judgment becomes of record in the court below, 705.
- recognisance of bail and *scire facias* on it, 705.
- copy of opinion sent with record, 705.

**Replevin, general issue in, 462.****Replication, what it is, 484.**

- if by way of traverse, must tender issue, 484.
- joinder in issue, 484.
- rejoinder, what it is, 484.
- new assignment, 485.
- departure in pleading, 485.
- mode of compelling, 485.
- when want of replication is not error, 486.
- entry by clerk sufficient joinder of issue, 486.
- de injuria*, 486.
- trial on merits cures want of, 486.
- to defective dilatory plea waives defect, 486.
- defects in, when cured, 486.

**Reserved points, 588.****Restitution, writ of, when it will be ordered and when not, 706.**

- the order of, 707.
- when made, 707.
- what will be restored, 707.
- nature of the writ, 707.
- executor defendant, 708.
- lien of the writ, 708.

**Retraxit, 483.**

- what it is; almost unknown in Pennsylvania, 483.

**Return, 269.**

- by sheriff, 918.
- days, 259.
- to *capias*, 1128.
- to commission, 522.
- to *venditioni exponas*, 1017.
- (see Execution.)

**Reversal (see Error, Writ of, Judgment on).****Review, by means of writ of error, 676.**

- by Supreme Court, 678.

**Revision by commissioners, 13.**

- sources whence the present acts have been drawn, 13.
- additional powers given not contained in former acts, 14.

**Rule for commission, 519.**

- for non pros., 527.
- for trial on non pros., 527.
- to answer in equity, 99.
- to show cause, motion for, 1161.
- to take depositions, 500, 518.
- as to attachment for witnesses, 555.
- of court as to pleading, 442.
- of practice, power to establish, 122.

- Sale by sheriff, 911-917.  
     under venditioni, 994-1035.
- Satisfaction, fraudulent entry of, 670.  
     of execution, 1129-1131.  
     of judgment (see Judgment, Satisfaction of).
- Scire facias, 142.  
     costs in, 721.  
     costs on, 735.  
     on official bonds, 414.
- Secondary evidence (see Depositions).
- Security for costs—rule of court; District Court, 740.  
     practice under the rule, 740.  
     practice in Common Pleas and Supreme Court 741  
     when security will be required, 741.  
     residence of plaintiffs, 741.  
     residence of defendants, 741.  
     demand for security must be made within a reasonable  
     time, 741.  
     must be after bail in bailable actions, 741.  
     case of infancy, 742.
- Sequestrator, 782, 1151-1157.
- Service, 261-268.
- Set-off (see Execution; Special Matter), 113.  
     costs of, 770.  
     costs on, 730.  
     decisions under, 466-467.
- Setting aside, sole grounds for, 1010.
- Sheriff—his deed (see Execution against Real Estate).  
     his liability arising under writs of capias, 333.  
         in respect to service, 334.  
         in respect to return, 334.  
         in respect to bail, 334.  
         in respect to escape, 335.
- proceedings against, 336.  
     staying proceedings, 338.  
     proceedings before, on writ of inquiry, 417.  
     receipts, 1030.  
     sale of real estate, 994-1037.  
     (see Execution; Officers of the Court).
- Short causes, 698.  
     pleadings (see Pleas).  
     pleas, 452-471.
- Soldiers (see Arrest).
- Special capias ad respondendum—preliminary, 348.  
     how the writ issues, 348.  
     the proceedings under it, 348.
- equitable pleas, 116.
- juries—what is a special jury, 536.  
     strictly speaking, no special juries in Pennsylvania, 536.  
     striking juries at Nisi Prius, 536.  
     striking juries in District Court, 536.  
     rules of court, 537.  
     party trying before general jury waives rule for struck jury, 537.
- or and set-off, 463.  
         Act of 1705, 463.  
         defalcation, 463.  
         Act of 1836, 464.  
         the old act for defalcation, 464.  
         difference between British and Pennsylvania Defalca-  
         tion Acts, 464.  
         rules of the Supreme Court and Common Pleas  
         (note), 465.  
         notice of set-off and special matter encouraged, 465.  
         notice of set-off must correctly describe demand, 465.

**Special matter and set-off, *continued*.**

- substance of, 465.
- payment under the Defalcation Law, 466.
- classification of decisions under set-off—as to claim;  
as to parties; as to practice, 466-467.

relief in equity, 60.  
verdict (see Verdict).

**Specific performance, 48, 75.**

- ordinary powers of chancellor, 79.
- will not enforce unconscionable bargain, 79.
- will compel performance by trustee, 80.
- will compel the vendor to make good misrepresentation, 80.
- will compel return of objects of curiosity when there is no redress by law, 80.
- will decree return of article detained in violation of trust, 80.
- will not compel vendee to receive a doubtful title, 80.
- will compel performance of contract for conveyance of lands, 80.
- will not compel vendee to take a bad title, 80.
- will order an issue to determine matters of fact, 81.
- executed contracts, 81.
- executory contracts, 82, 83.
- voluntary contracts *inter vivos*, 84.
- equity will not enforce a gaming contract, 84.
- parties must be diligent or equity will not aid them, 85.

**Specific relief, 53.****Statement, under Act of 1806, 354.**

- plaintiff must file declaration on, under Act of March 21st 1806, § 5, 354.
- general requisites and qualities of, 354.
- must state good cause of action, 355.
- may be filed after judgment, 355.
- if plaintiff files two narrs., the court will order him to elect on which he will go to trial, 356.
- errors cured by verdict, 356.
- videlicet*, 356.
- declarations on appeals, 357.
- amendments, 357.
- under the act, 358.
- its form and requisites, 359.
- must set forth good cause of action, 358.
- evidence under the statement, 358.
- variance, 359.
- examples of, held sufficient by the court (note), 358.
- may be filed in debt on recognisance of bail in error, 360.
- must follow act, 360.
- courts apply rules of pleading, 361.
- declaration or statement must be filed in the prothonotary's office, 362.
- rules of the District Court, 362.
- judgment of non pros., 363.
- judgment of nonsuit, 363.
- when court will refuse to take off non pros., 363.
- former practice to obtain trial of the cause, 363.
- judgment of non pros. under former rule of court, 363.
- present practice, 364.

**Stay of execution, on account of a writ of error or appeal, 829.**

- by agreement, 830.
- by statute, 832.
- freeholders, 832.
- period of stay, 834.
- practice, 834.
- bail for stay of execution, 834.

**Stay of execution, *continued.***

- his security for thirty days, 835.
- bail for the full period, 835.
- time within which bail must be entered, 836.
- mode of entering bail, 836.
- exceptions to bail, 837.
- effect of entering bail, 838.
- the time of the stay, 838.
- as regards the plaintiff, 839.
- the defendant, 840.
- the surety, 840.
- discharge of surety, 840.
- waiver of, 841.
- statutory stay in special cases, 841.
- soldiers, 841.
- executors and administrators, 841.
- mechanics' lien, 842.
- stay prohibited, 842.
- power of court to control executions, 842.
- staying and setting aside executions by the court, 844.
- injunction, 848.

**Steamboat Act, 142.****Stock, execution against, 973.**

- held in the name of defendant, 973.
- where stock belonging to defendant is held in the name of another, 974.
- may be taken in execution, 797.

**Subpoena, 541.**

- for witnesses, 55.
- rules of court as to subpoenas for witnesses, 555.
- rules of District Court as to attachment for witnesses, 555, 556.
- absence of witnesses independently of court rules, 556.
- power to issue, 122.
- service of, 542.

**Suggestions of defence, 374.**

- of breaches on official bonds, 414.

**Summing up by counsel, 568.****Summons in personal actions, 258.**

- nature and form of the writ, 258.
- return days, 259.
- time of issuing the writ, 260.
- service, 261.
- regularly, 262.
- trespass or nuisance, affecting real estate, 262.
- waste committed on mortgaged premises, 263.
- covenant for ground-rent, 263.
- non-resident executors, administrators, assigns, or other trustees, 263.
- persons engaged in business in one county and residing in another, 263.
- non-residents of the state engaged in business in a county thereof, 263.
- lunatics, 264.
- corporations, 264.
- counties and townships, 267.
- local provisions, 267.
- publication, 268.
- waiver of error in service, 268.
- time of service, 269.
- the return, 269.
- alias, 271.
- appearance, 271.
- generally, 273.
- time allowed for entering appearance, 273.

Summons in personal actions *continued.*

judgment by default for want of an appearance,  
274.

time at which judgment may be taken, 274.

the manner of taking judgment, 276.

## in real actions, 278.

the jurisdiction of real actions, 278.

the form of the writ, &c., 279.

service, 279.

minors, 279.

lunatics, 279.

dower and partition, 279.

ejectment, 280.

waste, 281.

service out of the county, 281.

publication, 281.

bail demandable, 282.

appearance and judgment for default of appearance,  
282.

## Supersedeas, 687.

writ is supersedeas from delivery, 687.

execution not to issue within certain periods after judgment, 688.

when an execution is executed, 688.

second writ of error after abatement of first, 688.

when the writ is not a supersedeas, 689.

special leave to take out execution notwithstanding a writ of error,  
689.

## Supplemental affidavits (see Affidavit of Defence).

bill, 100.

## Supreme Court, authority to correct errors, 676.

of the United States, error to, 710.

## Surplus, disposition of, arising from sheriff's sale, 1070, 1093.

practice before auditors, 1071.

jurisdiction of court, 1071.

appointment, 1072.

powers at the hearing, 1073.

jurisdiction, 1074.

report, 1077.

compensation, 1078.

costs of audit, 1078.

feigned issue, 1079.

who may apply, 1079.

time of application, 1079.

mode of application, 1080.

grounds for granting the issue, 1081.

form of the issue, 1082.

trial; evidence; costs, 1083.

effect of issue, 1084.

error, 1085.

filing the report, 1087.

exceptions, 1087.

decree of distribution, 1089.

effect of decree, 1089.

appeal from decree, 1090.

who may appeal, 1091.

time of appealing, 1091.

manner of taking the appeal, 1092.

grounds, 1092.

effect of appeal upon the distributees, 1093.

of purchasers, 1093.

## Surprise, 591 611.

## Suspension of action, pleas in, 442.



Talsmen, 563.

Taxation of costs, appeal from, 756.

Taxes, 1042.

Tender, costs after, Act of 1705, § 2, 743.

previous to institution of suit; payment into court, 743.

payment must be made under a rule, 743.

payment into court after suit brought, must be with costs up to time of payment, 744.

where plaintiff becomes nonsuited, defendant is entitled to costs, 744.

after payment into court defendant cannot take money out, 744.

rule in the Common Pleas, 744.

Terms of Supreme Court (see Supreme Court).

Terre-tenant, 1116-1122.

Testatum execution, 782.

*feri facias*, 1135.

        the lien of the writ, 1137.

        satisfaction, 1137.

Testimony, perpetuation of (see Witnesses), 52.

Time, computation of on motion, 625.

    for filing exceptions under Act of 1705, 626.

Tipstaves (see Officers of the Court).

Torts, 115.

Traverse, 451.

Treble costs (see Double Costs).

Trespass, costs in, 751.

Trial at law, on issue from Chancery, 60.

    by the record, 494.

        issue of *nul tiel* record, 494.

        this issue tried by the court, 494.

        where plea consists both of fact and matter of record the issue must be to the country, 494.

        replication in issue of *nul tiel* record, 494.

        the plea of *nul tiel* record, when to be used, 494.

        plea of *nul tiel* record must be tried by the record itself, 494.

        exemplification of record under Act of Congress, 496.

        material variance between record produced and that pleaded fatal, 496.

        judgment on *nul tiel* record may be interlocutory or final, 497.

        bill of exceptions on judgment on plea of *nul tiel* record, 497.

        practice on writ of error to judgment on issue of *nul tiel* record, 497.

    list, settlement of case on, 629.

Trover, costs in, 751.

Trustees, 35.

    equity jurisdiction over, 47, 52.

Trusts—removal of trustees for misconduct and other causes which render them unfit to execute the trust, 54.

    the discharge of trustees at their own request, 55.

    the appointment of new trustees in all cases of vacancy or inability, whether by death, removal, or otherwise, 55.

    relief in the cases of infant, idiot, insolvent, or absent trustees, by directing conveyances, 55.

    compelling conveyance of the legal estate to the *cestui que trust* when the trust has expired, 55.

Trusts and trustees, equity jurisdiction over, 49.

United States, exemption from costs, 722.

Variance, 359.

Venditioni exponas, 782, 935, 992.

Venire de novo, 702.

Verdict—to be given openly, 581.  
     sealed verdict, 581.  
     not binding on the jury, 581.  
     court may send jury back to reconsider, 582.  
     time and manner of receiving, 582.  
     altering or amending, 582.  
     general, 582.  
     requisites of, 582.  
     entering on good counts, 582.  
     Act of 1705 for defalcation, 583.  
     Act of 1848, 583.  
     jury fee and interest, 583.  
     special verdict, 583.  
     jury must decide the facts, 583.  
     form and conclusion, 583.  
     court cannot go out of, 584.  
     but may order amendment, 584.  
     or restatement by a new trial, 584.  
     making up of special verdict, 584.  
     against evidence, 598.  
     against law, 598.  
     defects cured by, 621.  
     form of, 645.  
     judgment, 589.  
     interest on, 649.  
     of jury on writ of inquiry, 417.  
     requisites of, 631.  
     (see Attachment Execution).

Vicifictet, 356.

Views—party must move court for a view, 537.  
     Act of 1834, §§ 158, 159, 537.  
     motion for must be founded on affidavit of circumstances, 537.  
     expenses of, fall on losing party, 537.  
     no evidence can be given at time of, 538.  
     no peremptory challenges to viewers, 538.

Void and voidable executions, 878–880.

Voluntary arbitration (see Costs).  
     nonsuit, 578.

Wages (see Execution).

Waiver of exemption, 819.  
     of levy, 981.

Warrant of arrest, 338.  
     preliminary, 338.  
     the issuing of the writ, 339.  
     the form of the warrant, 341.  
     service, 341.  
     hearing before the judge, 341.  
     adjournment, 342.  
     commitment, 342.  
     effect of commitment, 343.  
     how defendant may avoid imprisonment, 343.  
     discharge, 345.  
     costs, 347.  
     fraud punished criminally, 347.  
     of attorney, 397.

Waste, costs in, 721.

Widow's claim (see Execution).  
     exemption, 820, 826.

Will, costs in establishing, 739.

Witnesses, 539, 544.  
     procuring testimony, 539.  
     evidence is either written or parol, 539.

*Witnesses, continued.*

- written evidence, 540.
- parol evidence, 540.
- who may be witnesses, 540.
- subpoena ad testificandum, 541.
- rule of the District Court, 541.
- subpoena duces tecum, 541.
- subpoena duces tecum not to issue to public officer, 542.
- when certified copies are evidence, 542.
- Act April 22d 1846, 542.
- notice to produce papers must be given, 542.
- service of subpoena, 542.
- fees of, 542.
- attachment against, 544.
- special action on the case against, 544.
- rule for attachment, when granted, when refused, 544.
- habeas corpus ad testificandum, 544.
- absence of, 555.
  - affidavit required by rules of District Court and Nisi Prius, 555.
  - affidavit where there is no rule of court, 555.
- attachment against, 544.
- examination of, 564, 566.
  - right to be heard in person or by counsel, 564.
  - order of opening the case, 564.
  - defence not to be opened by cross-examination, 564.
  - rules of court, 564.
  - party to state points to be proved, 564.
  - to be regulated by the judge, 564.
  - one counsel to examine, 565.
  - examination on voire dire, 565.
  - proving interest by other evidence, 565.
  - party objecting is to show interest, 565.
  - purpose of evidence to be stated, 565.
  - evidence to be shown relevant by subsequent evidence, 566.
  - time and manner of examining witnesses a matter of discretion for the court, 566.
- fees of, 542, 767.
- must sign depositions, 512.
- subpoena to compel attendance, 503.
- (see Commission to Examine Witnesses).
- (see Depositions).

*Writ, form of, 258.*

- in real actions, 279.
- of *capias* (see *Capias ad Satisfaciendum*).
- of error, for whom it lies, 681, 683.
  - Act of 1722 gives writ to every person aggrieved, 681.
  - Act of 1850 gives writ to each party after decision on writ taken by the other, 681.
  - where both parties take writ to the same judgment, 682.
  - one party can have only one writ to the same judgment, 682.
  - may be brought by either party, 682.
  - unless contrary to his agreement, 682.
  - implied agreement not to take writ, 682.
  - only for a party aggrieved, 682.
  - who is a party aggrieved, 682.
  - where there are several plaintiffs or defendants, 683.
- specific statutory, regulations as to, 681.
- in certain cases the decision of the lower court is final by statute, 681.
- when proper form of remedy, 677.

Writ of error, *continued.*

(see Error.)

(see Nul Tiel Record.)

execution, form of (see Execution).

inquiry, 407, 409. —

inquiry, costs on, 724. —

prohibition in United States Courts, 219

venditioni, 993.

return of (see Execution).

service of, in real actions, 279, 282.

(see Summons.)

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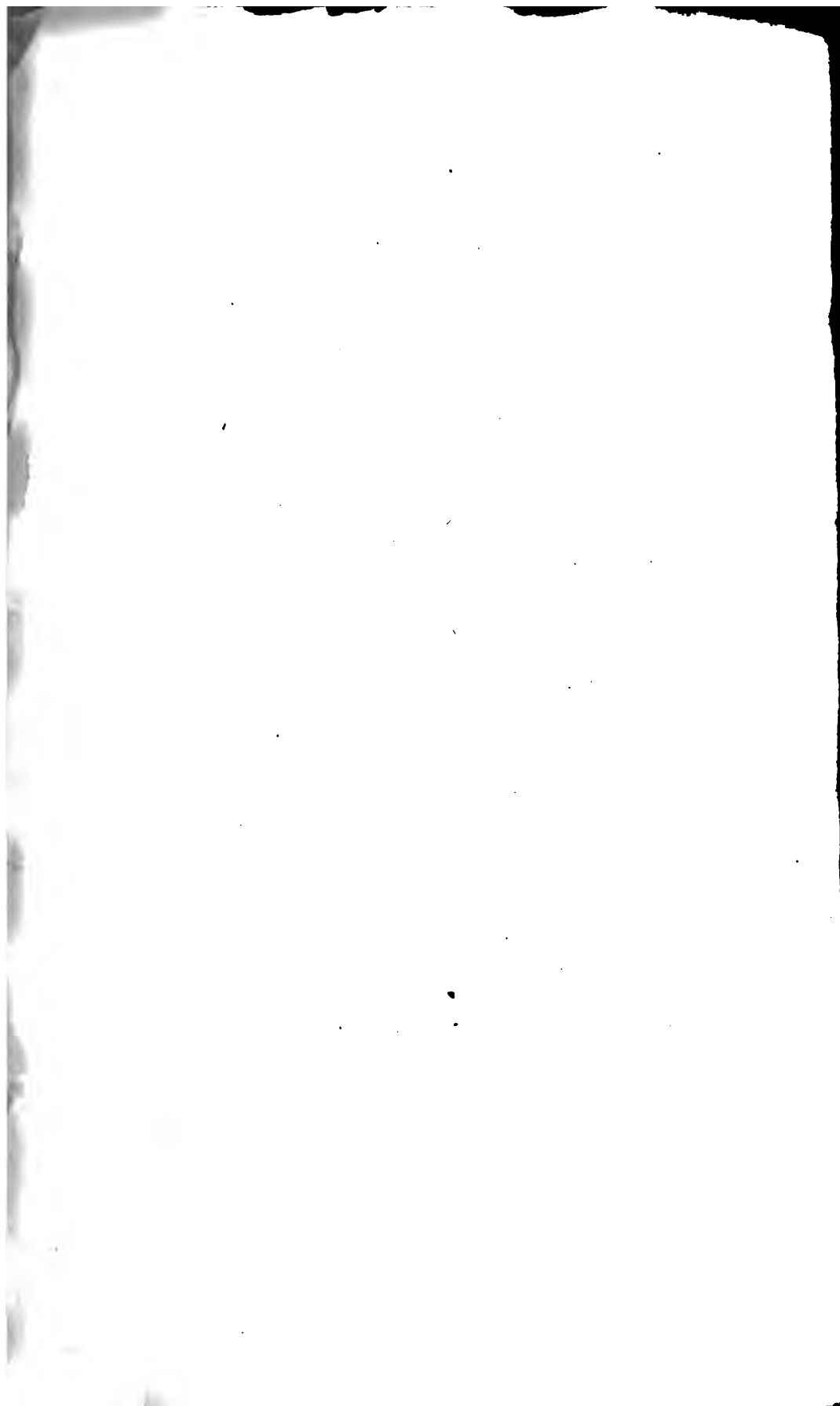
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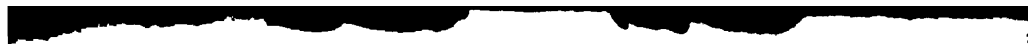
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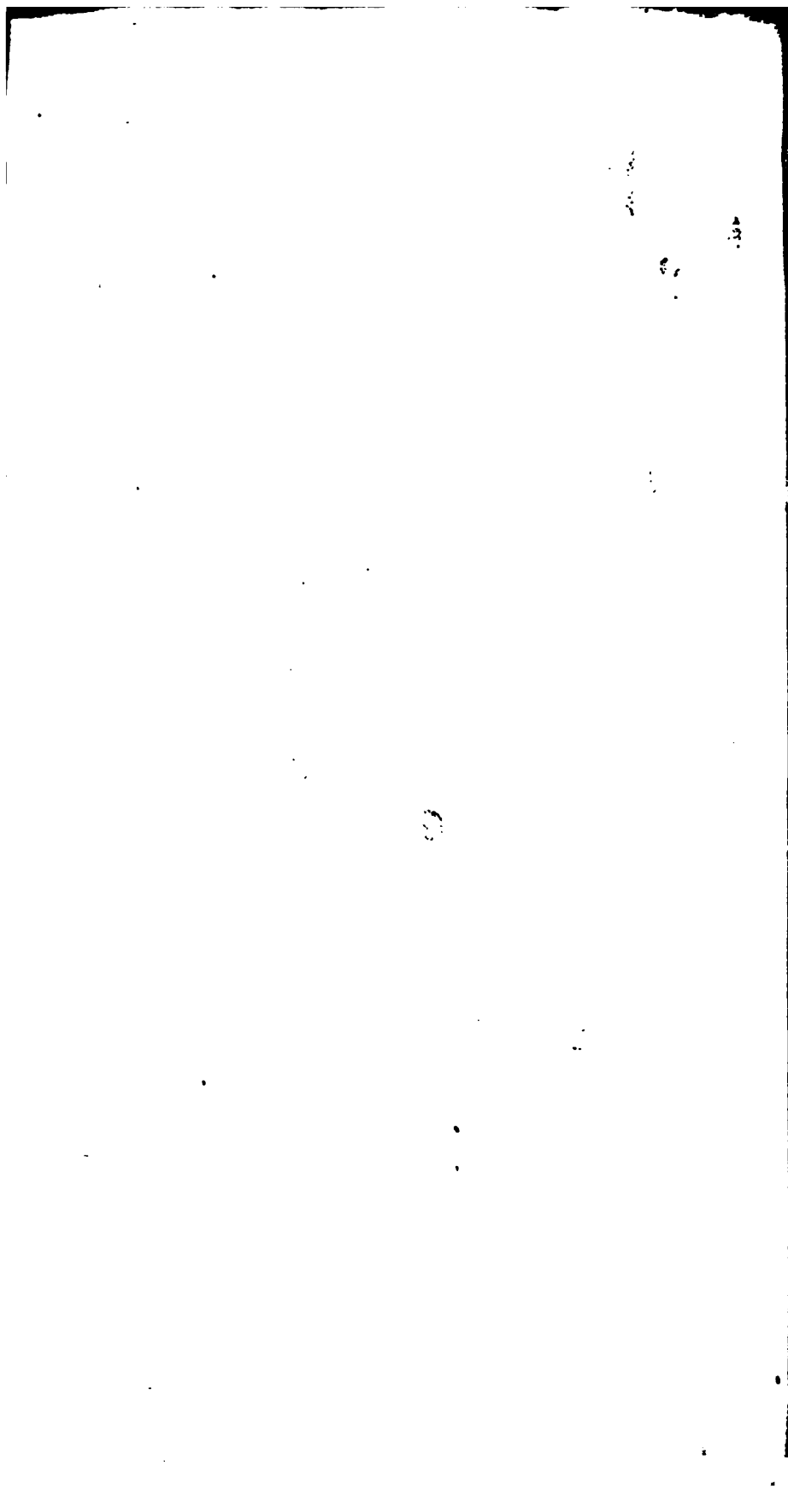
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